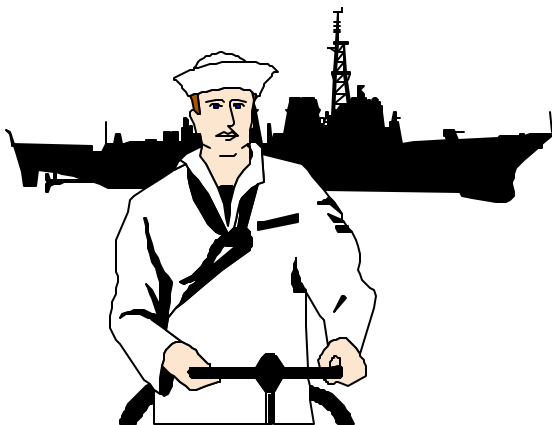


# **SOLDIERS' AND SAILORS'**



# **CIVIL RELIEF ACT GUIDE**

Legal Assistance Branch  
Administrative and  
Civil Law Department  
The Judge Advocate General's School, U.S. Army  
Charlottesville, Virginia

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**TO THE CORRESPONDENCE COURSE STUDENT:**

The materials in this publication provide an introduction to the basic law in the subject matter area. Study and comprehension of this material during the correspondence phase will establish the necessary foundation for further, practice-focused instruction during the resident phase.

## **PREFACE**

This publication is one of a series prepared and distributed by the Legal Assistance Branch of the Administrative and Civil Law Department of The Judge Advocate General's School, U.S. Army (TJAGSA). Legal assistance attorneys should find this series useful in the delivery of legal assistance. The information contained herein is as current as possible as of the date of publication. Attorneys should recall, however, the law is subject to legislative amendment and judicial interpretations that occur much more rapidly than this publication can be updated and distributed. For this reason, use this publication only as a guide and not final authority on any specific law or regulation. Where appropriate, legal assistance attorneys should consult more regularly updated references before rendering legal advice.

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The series is part of the continuing effort to improve and expand the resources available to legal assistance practitioners. As you use this publication, if you have any recommendations for improvement, please send your comments and suggestions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

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JA 267	Uniformed Services Worldwide Legal Assistance Office Directory
JA 269	Legal Assistance Federal Income Tax Information Series
JA 270	Uniformed Services Employment and Reemployment Rights Act Guide
JA 271	Legal Assistance Office Administration Guide
JA 272	Legal Assistance Deployment Guide
JA 274	Uniformed Services Former Spouses' Protection Act - Outline and References
JA 275	Model Tax Assistance Program
JA 276	Preventive Law Series

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# THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

## GUIDE

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## **Chapter 1**

### **Introduction**

#### **1-1. Historical Background**

The very nature of military service often compromises the ability of service members to fulfill their financial obligations and to assert many of their legal rights. Congress and the state legislatures have long recognized the need for protective legislation. During the Civil War, the United States Congress enacted an absolute moratorium on civil actions brought against Federal soldiers and sailors, and various southern states enacted similar legislation.<sup>1</sup> During World War I, Congress passed the Soldiers' and Sailors' Civil Relief Act of 1918.<sup>2</sup> The 1918 statute did not create a moratorium on actions against service members, but it directed trial courts to take whatever action equity required when a service member's rights were involved in a controversy.

The present Federal legislation. The Soldiers' and Sailors' Civil Relief Act of 1940<sup>3</sup> is essentially a reenactment of the 1918 statute. Experience during World War II and subsequent armed conflicts made certain changes in the statute necessary. The first of these amendments became law in 1942.<sup>4</sup> In amending the Act, Congress was motivated, in part, by the desire to override court decisions that, in some instances, had led to restrictive interpretations of the Act.<sup>5</sup> The latest amendment occurred in 1991 as a result of Desert Shield/Storm. This guide incorporates those changes.<sup>6</sup>

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<sup>1</sup>Act of June 11, 1864, ch. 118, 13 Stat. 123. Robinson, *Justice in Grey* (Harvard Univ. Press, 1941), pp. 83-88.

<sup>2</sup>Act of Mar. 8, 1918, ch. 20, 40 Stat. 440.

<sup>3</sup>Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178.

<sup>4</sup>Act of Oct. 6, 1942, ch. 581, 56 Stat. 769. Minor changes were made in the Act of Jan. 20, 1942, ch. 10, 56 Stat. 10; Act of May 13, 1942, ch. 303, 56 Stat. 276; and Act of Oct. 21, 1942, ch. 619, 56 Stat. 964.

<sup>5</sup>S. Rep. No. 1558, 77th Cong., 2d Sess. 2 (1942):

The purpose of the reported bill is to make available additional and further relief and benefits to persons in the military and naval forces and, in some instances where there has been doubt as to whether particular transactions or proceedings are within the scope of the Civil Relief Act, a new section on language has been added for the purpose of clarification only and to carry out the original intent of the Congress, but with no intent to exclude from the provisions of the Act any transaction or proceeding now included.

<sup>6</sup>Act of 18 March 1991, Pub. L. No. 102-12, 105 Stat. 34. The present law is found in 50 U.S.C. App. ?? 501-548, 560-593 (1988 & Supp. 1994).



## **1-2. Organization of This Guide**

This guide generally follows the order of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Four exceptions are the combination of Article I, General Provisions, and Article VI, Administrative Remedies, in Chapter 2; the combination of Article II, General Relief, and Article VII, Further Relief, in Chapter 3; the dividing of Article V, Taxes and Public Lands, into two chapters, Chapter 6, Taxes, and Chapter 7, Public Lands; and the inclusion of Section 1, Short Title (50 U.S.C. App. § 501), Section 100, Purpose and Scope of the Act (50 U.S.C. App. § 510), and Section 105, Notice of Benefits (50 U.S.C. App. § 515), in this chapter.

Throughout this guide the abbreviation "SSCRA," or the terms "Act," or "the Act" refer to the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, unless otherwise stated. The guide will refer to various sections of the legislation itself, rather than to codified sections of the U.S. Code. Lawyers researching specific problems should also consult an annotated copy of the U.S. Code for current references to state and federal decisions.

Chapters 8 and 9 are SSCRA outlines of instruction currently used at TJAGSA. Chapter 10 is an information paper specifically for reserve personnel coming onto active duty. Also included in Chapter 10 is a set of teaching notes for reserve component attorneys to use in preparing to make presentations on the Act

## **1-3. Material Effect**

A central equitable concept, expressed in slightly varying statutory language, is embodied in many of the Act's relief provisions. It is the concept of "material effect."<sup>7</sup> In almost every case involving a service member, trial courts are required to form an opinion of the extent to which the service member's military service has materially affected the particular situation. After this crucial determination has been made, either in favor of or adversely to the service member, the court may proceed with or stay the case at bar.

The concept of material effect comes into play in two broad, and sometimes interconnected, factual patterns. The patterns might be referred to as (1) the ability to protect rights and (2) the ability to meet financial obligations. Difficulties in both areas frequently arise as they represent the most common contexts in which courts apply the provisions of the Soldiers' and Sailors' Civil Relief Act.

Factual patterns giving rise to disputes about the existence and extent of service members' liability or obligations raise the question of the service members' ability to protect their rights. Trial courts must decide whether military service does, in fact, materially affect the service member's ability to protect his or her rights. In this context, the service member is usually seeking a delay--a stay in the proceedings until personal appearance is possible.

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<sup>7</sup>"Material effect" and variations of the term are essential elements of the following sections of the Act: §§ 201, 202, 203, 206, 300(2), 301(3), 302(2), 305(1) and (2), 306, 500(2), 513 and 700(1).

Material effect problems also arise in purely financial situations. Here the existence of a fixed obligation or a liquidated liability is admitted. A service member's request for relief under the SSCRA may put in issue the question of whether military service has materially affected the service person's ability to discharge, in the previously agreed upon manner, the admitted financial obligations. Trial courts concern themselves, therefore, with the service member's financial situation before and after entering military service. After evaluating the effect of military service, the court may either grant a stay of proceedings or some other relief if the service member is equitably entitled to it, or deny relief entirely.

In some cases, the two common factual patterns are commingled. Therefore, in considering individual cases falling within the relief provisions of the Act, judges, and attorneys representing service members, must know and understand fully the differences in the burden and the elements of proof required to establish the material effect of military service.

#### **1-4. Constitutionality and Short Title**

##### **Section 1**

This Act may be cited as the Soldiers' and Sailors' Civil Relief Act of 1940.  
(50 U.S.C. App. § 501).

The power of Congress to pass legislation as contained in the Act was subject to favorable judicial action shortly after the Civil War.<sup>8</sup> The 65th Congress also wrestled with the constitutionality of the proposed Act of 1918, but decided in favor of it.<sup>9</sup> A line of cases from federal and state courts supported this view.<sup>10</sup>

When the current Act was challenged in the case of Dameron v. Brodhead,<sup>11</sup> the Supreme Court held that Congress could pass legislation such as the Act by virtue of its power "to declare war"<sup>12</sup> and "to raise and support armies."<sup>13</sup>

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<sup>8</sup>Steward v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870); "The power to pass [relief legislation] is necessarily implied from the powers to make war and suppress insurrection."

<sup>9</sup>H.R. Rep. No. 181, 65th Cong., 1st Sess. (1917). Possible objections considered were: Art. I, § 10, "No State shall . . . pass any . . . law impairing the obligation of contracts," and the protections guaranteed by the Fifth Amendment.

<sup>10</sup>E.g., Clark v. Mechanics' American Nat. Bank, 282 F.2d 589 (8th Cir. 1922); Konkel v. State, 168 Wis. 335, 170 N.W. 715 (1919).

<sup>11</sup>Dameron v. Brodhead, 345 U.S. 322 (1953).

<sup>12</sup>U.S. Const., Art. 1, § 8, cl. 11.

<sup>13</sup>*Id.* cl. 12.

In short, legislation conferring civil relief for members of the military service has survived judicial scrutiny from the days of the Civil War until the present.

## 1-5. The Purpose and Scope of the Act

### Section 100

(50 U.S.C. App. § 510)

In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.

While not expressing any substantive statutory provisions, Section 100 has been a guide for courts construing the Act. Whether upholding or rejecting a claim, courts will often include wording of this section or their interpretation of it to give weight to their decisions. Generally, courts have been favorable to the service member. The U.S. Supreme Court has declared that the Act must be read with "an eye friendly to those who dropped their affairs to answer their country's call."<sup>14</sup> A majority of Federal and state courts have construed the present Act and the Act of 1918 in this spirit.<sup>15</sup>

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<sup>14</sup>Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

<sup>15</sup>*E.g.*, Plesha v. U.S., 227 F.2d 624 (9th Cir. 1955), *aff'd*, 352 U.S. 202 (1957) (construed liberally to benefit servicemen and veterans); Hurwitch v. Adams, 151 A.2d 286 (Del. Super. 1959), *aff'd*, 155 A.2d 591 (1959) (broad interpretation for benefit of those it was designed to assist); Application of Packard, 187 Misc. 400, 60 N.Y.S.2d 506 (1946) (construed liberally). McCoy v. McSorley, 119 Ga. App. 603, 168 S.E.2d 202 (1969) (Section 501 *et seq.* . . . should be liberally construed in favor of service member); Feldman v. Grelewicz, 397 N.Y.S.2d 355, 91 Misc. 2d 147 (1977) (purpose of section 501 *et seq.* to ensure persons in the military were fully informed of legal proceedings, and have adequate time to appear and protect their rights); Hanson v. Crown Toyota Motors Inc., Utah, 572 P.2d 380 (1977) (intent of section 501 *et seq.* to protect one's property during a period of military service). In addition *see* United States v. Kaufman, 453 F.2d 306 (C.A.N.Y. 1971); United States v. State of Illinois, 387 F. Supp. 638 (E.D. Ill. 1975); Zaki v. Bryan, 403 N.Y.S.2d 765, 91 Misc. 2d 147, ED. A.D. 1018 (1978); Omega Industries, Inc. v. Raffaele, 894 F. Supp. 1425 (D. Nev. 1995); and Murdock v. Murdock, 526 S.E.2d 241, 247 (S.C. 1999). *See also* S. Rep. No. 1558, 77th Cong., 2d Sess. 6 (1942): "Any doubts that should arise as to the scope and application of the act should be resolved in favor of the person in military service involved."

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A few of those whom the Act is intended to protect will abuse its purpose. For instance, the Act "may not be employed to enable one who had flouted his obligations in civilian life to obtain indefinite delay."<sup>16</sup> The Act itself has provided for abuses by not granting protection in those actions in which an "interest, property, or contract" has been transferred merely to take advantage of the Act.<sup>17</sup> Other cases, however, have indicated the Act is also designed to protect rights of individuals having causes of action against persons in the military service.<sup>18</sup>

While the Act is intended to provide civil remedies, Congress has reinforced the spirit of Section 100 by imposing criminal penalties when failure to comply would thwart equitable civil relief.<sup>19</sup>

On the other hand, the Act is not a panacea for every legal problem of a civil nature facing the service member. It will not, for instance, help rescind a rental agreement or a contract for the purchase of an automobile or a set of encyclopedias entered into after entry onto active duty. There are a myriad of situations in which the Act will not apply.

The purpose of this publication is to provide guidance to the military lawyer giving initial advice to a legal assistance client. It may be used to provide the service member with an immediate defense to a potential adversarial proceeding. In this regard, provisions of Section 100 reinforce arguments based on the provisions of substantive sections. For the adversary not acting in good faith, however, the local assistant United States attorney may intervene if a criminal penalty is provided. This guide is intended to be used as a guide and, therefore, should be supplemented by whatever additional legal research is necessary to meet the requirements of the military client.

### **1-6. Notice of Benefits to Persons in and Persons Entering Military Service**

#### **Section 105**

(50 U.S.C. App. § 515)

The Secretary of Defense and the Secretary of Transportation, with respect to the Coast Guard when it is not operating as a service in the Navy, shall ensure the giving of notice of the benefits accorded by this Act to persons in and to persons entering military service. The Director of Selective Service shall cooperate with the Secretary of

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<sup>16</sup>Franklin Soc. for Home-Building & Savings v. Flavin, 265 App. Div. 720, 721, 40 N.Y.S.2d 582, 583, *aff'd*, 291 N.Y. 530, 50 N.E.2d 653, *cert. denied* 320 U.S. 786 (1943). *See also* Diamond v. United States, 344 F.2d 703, 170 Ct. Cl. 166 (1965); Keefe v. Spangenberg, 533 F. Supp. 49 (D.C. Okla. 1981).

<sup>17</sup>SSCRA § 600. For a discussion of this provision see para. 2.8, *infra*.

<sup>18</sup>Ray v. Porter, 464 F.2d 452 (6th Cir. 1972); Ricard v. Birch, 529 F.2d 214 (4th Cir. 1975).

<sup>19</sup>SSCRA §§ 200, 300, 301, 302, 304, 305. These provisions are discussed in chapters 3 and 4.

Defense and the Secretary of Transportation in carrying out the provisions of this section.

Instruction on the provisions of the Act is required during an early period of military training.<sup>20</sup> Because this instruction is conducted at such an early stage, legal assistance<sup>21</sup> and preventive law<sup>22</sup> programs should remind service members of the Act on a continuing basis.<sup>23</sup> Judge advocates should also ensure local bar associations and recruiting stations are sufficiently informed to advise individuals of the Act before they enter active duty. This will enable prospective service members to invoke the Act in a timely manner.

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<sup>20</sup>Army Reg. 612-201, Personnel: Processing Control and Distribution of Personnel at U.S. Army Reception Battalions and Training Centers (24 April 1987).

<sup>21</sup>Army Reg. 27-3, Legal Services: The Army Legal Assistance Program, paras. 3-4 and 3-6 (10 September 1995). See also Air Force Instruction 51-504, Legal Assistance, Notary, and Preventive Law Programs, paras. 1.3.1 and 3.2.2 (1 May 1996); Navy and Marine Corps Judge Advocate Manual (JAGMAN) [JAGINST 5800.7C], Chapter VII (3 October 1990); and [Navy] JAGINST 5801.2, Navy-Marine Corps Legal Assistance Program, paras. 7-2j, and 7-3b(1) (11 April 1997).

<sup>22</sup>*Id.*

<sup>23</sup>The teaching outline at Chapter 8 may be helpful in presenting preventive law classes.

## **Chapter 2**

### **General Provisions**

#### **2-1. Purpose and Scope**

The purpose of this chapter is to define and identify the class of persons protected by the Act. Additionally, it deals with how and when this protected status attaches, the effect of this status, and, ultimately, how and when it can be modified or terminated.

#### **2-2. Definitions**

##### **Section 101**

(50 U.S.C. App. § 511)

(1) The term "person in the military service", the term "persons in military service", and the term "persons in the military service of the United States", as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term "military service", as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service," as used in this Act, means, in the case of any person, the period beginning on the date on which the person enters active service and ending on the date of the person's release from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person", when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court", as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

*a. Members of the military establishment.* The threshold question confronting courts in cases involving the Soldiers' and Sailors' Civil Relief Act is the

status of the party seeking the benefits of the Act. The court must determine whether the party is a "person in the military service" of the United States as defined by the first sentence of section 101(1), the dependent of such a person, a person primarily or secondarily liable on an obligation with such a person, or a person to whom the Act's coverage is specifically extended in particular situations.

In defining those who are "persons in the military service of the United States," the first sentence of section 101(1) unequivocally states that only members of the organizations listed "and no others" are such persons. Congress intended that all members of the military establishment be covered by the Act.<sup>1</sup> The definitions contained in other Federal statutes, particularly those in Title 10, United States Code, help determine which members of the military are covered by the Act.

(1) *Army.* The term "Army of the United States" contained in this section is synonymous with the term "Army" used throughout Title 10, United States Code. The components of the Army are defined as--<sup>2</sup>

(a) the Regular Army, the Army National Guard (while in active federal service of the United States for SSCRA protection), and the Army Reserve (while in active federal service of the United States for SSCRA protection); and

(b) all persons appointed or enlisted in, or conscripted into, the Army without component.

(2) *Air Force.* The Air Force was established as a separate military service by the National Security Act of 1947. Pursuant to the saving provisions in section 305a of that Act, all laws then relating to Army personnel became applicable to the personnel of the Air Force. The Soldiers' and Sailors' Civil Relief Act of 1940 was among those laws. The 1991 amendments to the Act specifically included the Air Force as members of the military. The components of the Air Force are defined as--<sup>3</sup>

(a) the Regular Air Force, the Air National Guard (while in active federal service of the United States for SSCRA protection), and the Air Force Reserve (while in active federal service of the United States for SSCRA protection);

(b) all persons appointed or enlisted in, or conscripted into, the Air Force without component; and

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<sup>1</sup>See S. Rep. No. 2109, 76th Cong., 3d Sess. 1-2 (1940).

<sup>2</sup>10 U.S.C. § 3062(c) (1994).

<sup>3</sup>*Id.* § 8062(d).

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(c) all Air Force units and other Air Force organizations, with their installations and supporting and auxiliary combat, training, administrative, and logistic elements; and all members of the Air Force, including those not assigned to units, necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency. (These persons must be in active federal service of the United States for SSCRA protection).

(3) *Navy.* The term "United States Navy" contained in this section is synonymous with the term "Navy" used in Title 10, United States Code. The Navy includes "the Regular Navy, the Fleet Reserve, and the Naval Reserve."<sup>4</sup> (These persons must be in active federal service of the United States for SSCRA protection). A person, male or female, who is appointed or enlisted in or inducted or conscripted into the Navy is a "member of the naval service."<sup>5</sup>

(4) *Marine Corps.* The Marine Corps "includes the Regular Marine Corps, the Fleet Marine Corps Reserve, and the Marine Corps Reserve."<sup>6</sup> (These persons must be in active federal service of the United States for SSCRA protection). A person, male or female, who is appointed or enlisted in or inducted or conscripted into the Marine Corps is a "member of the naval service."<sup>7</sup>

(5) *Coast Guard.* The Coast Guard is a part of the armed forces.<sup>8</sup> It is a military service at all times, whether employed in the Department of Transportation or operating in the Navy.<sup>9</sup> The Coast Guard includes the Regular Coast Guard<sup>10</sup> and the

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<sup>4</sup>*Id.* § 5001(a)(1).

<sup>5</sup>*Id.* § 5001(a)(3).

<sup>6</sup>*Id.* § 5001(a)(2).

<sup>7</sup>*Id.* § 5001(a)(3).

<sup>8</sup>*Id.* § 101(4).

<sup>9</sup>14 U.S.C. § 1 (1994). (Responsibility for administration of the Coast Guard was transferred from the Department of Treasury to the Department of Transportation by Pub. L. No. 89-670, Oct. 15, 1966, 80 Stat. 937, 49 U.S.C. § 1655(b), except in time of war or when the President directs as provided in section 3 of this title.

<sup>10</sup>14 U.S.C. §§ 211-13, 351 (1994).



Coast Guard Reserve.<sup>11</sup> (These persons must be in active federal service of the United States for SSCRA protection).

(6) *Officers of the Public Health Service.* The Public Health Service is not a military service although it may be so designated by the President in time of war or national emergency.<sup>12</sup> The Secretary of Health, Education and Welfare may detail Public Health Service officers for duty with the Army, Air Force, Navy or Coast Guard.<sup>13</sup> While so detailed, in time of war, or while the Public Health Service is a military service by designation of the President, Public Health Service officers and their surviving beneficiaries are entitled "to all rights, privileges, immunities, and benefits now or hereafter provided under any law of the United States in the case of commissioned officers of the Army of their surviving beneficiaries on account of active military service, except retired pay and uniform allowances".<sup>14</sup>

Despite the language of section 101(1), which includes only those officers detailed to the Army and Navy, the benefits of the Soldiers' and Sailors' Civil Relief Act were extended to a lieutenant commander in the United States Public Health Service, assigned for duty with the Coast Guard<sup>15</sup> and Public Health Service officers terminating a pre-service lease agreement and contesting a child custody matter.<sup>16</sup>

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<sup>11</sup>14 U.S.C. §§ 701 (1994).

<sup>12</sup>42 U.S.C. § 217 (1994).

<sup>13</sup>42 U.S.C. § 215(a) (1994) (all functions of the Public Health Service of the Surgeon General of the Public Health Service, all officers and employees of the Public Health Service, and all functions of all agencies of or in the Public Health Service are transferred to the Secretary of Health, Education and Welfare by the 1966 Reorganization Plan No. 3, 31 Fed. Reg. 8855, 80 Stat. 1610, effective June 25, 1966. 42 U.S.C. § 202 (1994)).

<sup>14</sup>42 U.S.C. § 213(a) (1994).

<sup>15</sup>*Wanner v. Glen Ellen Corp.*, 373 F. Supp. 983 (D.C. Vt. 1974) (tolling provisions of Act suspended running of state's one-year statute of limitations for skiing accident suffered by lieutenant commander in Public Health Service).

<sup>16</sup> *Omega v. Raffaele*, 894 F. Supp. 1425, 1429-30 (D. Nev., 1995)(physician in Public Health Service entitled to use SSCRA to terminate pre-service lease on practice facility). *See also* *Sbargo v. Sbargo*, 264 A.D.2d 526; 694 N.Y.S.2d 723; 1999 N.Y. App. Div. LEXIS 8902 (N.Y. 1999) (Public Health Service physician on Indian reservation contesting child custody matter entitled to SSCRA stay of proceedings).

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*b. Persons not members of the military establishment.* Several categories of persons related to the military have been found to be outside the ambit of "persons in the military service of the United States." For example, a merchant seaman accompanying the Army and subject to Courts-Martial jurisdiction is not entitled to the benefits of the Act.<sup>17</sup> Similarly, civilian employees of the armed services,<sup>18</sup> contract surgeons,<sup>19</sup> and employees of government contractors<sup>20</sup> have been held to be persons not in the military service of the United States.

Although the Act primarily benefits persons in the military service, it can, however, include civilians. These include guarantors or accommodation makers,<sup>21</sup> those joined in law suits as co-defendants, and those who hold a dependent relationship to service members.<sup>22</sup>

*c. Active Federal service [Reserve Component Military Members].* In addition to being a member of the military establishment, a person seeking the benefits of the Act must also, pursuant to the second sentence of section 101(1), be either (1) on active duty or (2) engaged in "training or education under the supervision of the United States preliminary to induction into the military service."

The terms "active duty"<sup>23</sup> and "active service"<sup>24</sup> are synonymous, as evidenced by a comparison of the relevant code sections for "active service" and "active duty." In the

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<sup>17</sup>*Osborn v. United States*, 164 F.2d 767 (2d Cir. 1947). *But see* *Rosenbloom v. New York Life Ins. Co.*, 163 F.2d 1 (8th Cir. 1947).

<sup>18</sup>*Peace v. Bullock*, 254 Ala. 361, 48 So. 2d 423 (1950).

<sup>19</sup>*Hart v. United States*, 125 Ct. Cl. 294 (1953).

<sup>20</sup>*Hart v. United States*, 95 F. Supp. 679 (D.N.J. 1951).

<sup>21</sup>SSCRA § 103.

<sup>22</sup>SSCRA § 306. *See also* *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970) (statute of limitations tolled only if action is against person in military service or his heirs, executors, administrators, or assigns). *Cf.* *Ray v. Porter*, 464 F.2d 452 (6th Cir. 1972); *Card v. American Brands Corp.*, 401 F. Supp. 1186 (S.D.N.Y. 1975); *Spanpinato v. City of New York*, 311 F.2d 439 (2nd Cir. 1962), *cert. denied* 372 U.S. 980, 83 S.Ct. 1115, 10 L.Ed.2d 144, *reh'g denied* 374 U.S. 818, 83 S.Ct. 1699, 10 L.Ed.2d 1042; *Balconi v. Dvascas*, 507 N.Y.S.2d 788 (Rochester City Ct. 1986) (tenant was a dependent within meaning of SSCRA even though she was divorced, because she and her daughter were financially dependent on her ex-husband).

<sup>23</sup>10 U.S.C. § 101(d) (1) (1994).

latter case, "active duty" means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training in the active military service, and training at a school designated as a service school by law or by the Secretary of the military department concerned.<sup>25</sup>

As a result of the unambiguous language, courts have held that this does not include retired personnel not on active duty,<sup>26</sup> or those in the Reserve Component while not on active duty.<sup>27</sup> Are reservists performing annual 2-week training covered by the SSCRA? Yes. The Illinois Court of Appeals raised the SSCRA as a basis to reopen a default divorce case judgment where the trial court, aware that the defendant was on his annual Reserve training duty, held a hearing despite the defendant's absence.<sup>28</sup> Also, the First Circuit suggested that the SSCRA statute of limitations tolling provision may apply for Reserve drill weekends and 2-week annual training periods.<sup>29</sup>

What about National Guard members when serving on state active duty (non-federal) status? National Guard personnel not serving in a federalized status, such as state active duty for disaster relief under Title 32, United States Code, or Full Time National Guard Duty (FTNGD) as defined at Title 10, U.S. Code Section 101(d) (5)<sup>30</sup>, are not protected by the SSCRA.<sup>31</sup> For instance, the SSCRA does not protect

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(..continued)

<sup>24</sup>*Id.* § 101(d) (3).

<sup>25</sup>*Id.* § 101(d) (1).

<sup>26</sup>*Jax Navy Federal Credit Union v. Fahrenbruch*, 429 So.2d 1330 (Fla. Dist. Ct. App. 1983); *Lang v. Lang*, 176 Misc. 213, 25 N.Y.S.2d 775 (Sup. Ct. 1941).

<sup>27</sup>*Betha v. Martin*, 188 F. Supp. 133 (E.D. Pa. 1960).

<sup>28</sup>*In re Brazas*, 662 N.E.2d 559 (Ill. App. 1996). *See also* *United States v. Stephan*, 490 F. Supp. 323, 325 (W.D. Mich. 1980).

<sup>29</sup>*Mouradian v. John Hancock*, 930 F.2d 972, 973 (1st Cir. 1991). *Contra*, *Min v. Avila*, 991 S.W.2d 495 (Tex. App. 1999) (SSCRA tolling provision applies to Reserve Component annual training, but not weekend drill periods).

<sup>30</sup> Applicability of Soldiers' and Sailors' Civil Relief Act (SSCRA) to Full-Time National Guard Duty, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1991/1884, (21 June 1991).

<sup>31</sup> *Id.*

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National Guard members performing FTNG, despite Title 10, U.S. Code Section 12602 stating that such service is deemed to be active duty in the Federal service as a Reserve of the Army for purposes of benefits.<sup>32</sup> Why? Because the military has determined that SSCRA coverage is not a benefit for National Guard members, but legal protection.<sup>33</sup> National Guard members performing state active duty must look to state statutes that parallel the SSCRA for relief.<sup>34</sup>

*d. Preliminary training.* Periods of training or education preliminary to induction, if performed under the complete supervision of the United States, are treated as "full-time duty." The persons undergoing the training or education need not actually have already acquired a military status. This language appears to have been designed to cover World War II situations, such as officer candidates who were not yet members of the military establishment, but who were undergoing training and education to prepare them for military status.

*e. Divestment of rights.* Section 101(1) provides that "the terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave or other lawful cause." This raises the issue of the qualitative nature of an otherwise qualified person's military service. In the case of confinement, an Ohio court held that a soldier sentenced by a general Court-Martial to five years imprisonment, total forfeiture of pay and allowances, and a dishonorable discharge at the termination of the sentence was not on active duty or service and, hence, was not entitled to the benefits of the Act.<sup>35</sup>

In dictum, the court stated:

I do not mean to infer that commitment for any violation of the Army's rules and regulations would divest the soldier of his rights under the Soldiers'

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See ARIZ. REV. STAT. § 41-1071 (2000) [stay of administrative procedures]; N.J. STAT. ANN. §§ 38:23C-1 to -26 (West 2000) (State SSCRA-like provisions which cover National Guard members on Full-Time National Guard Duty (FTNG) and while on State Active Duty); and 51 PA. CONS. STAT. §§ 7309-7316 (1999) [SSCRA-like provisions which cover National Guard members on Full-Time National Guard Duty (FTNG) and while on State Active Duty].

<sup>35</sup> *Mantz v. Mantz*, 69 N.E.2d 637 (Ohio C.P. 1946).

and Sailors' Relief Act, but the gravity of the offense charged and the sentence of the Court-Martial are factors which must be considered in determining this question.<sup>36</sup>

This reasoning was apparently applied in an AWOL case when a court held that a soldier, who extended his leave 16 days without permission to attend the birth of his first child, was entitled to the benefits of the Act.<sup>37</sup> Another court, however, concluded that a sailor forfeited his protection under the Act when he was AWOL during his divorce trial.<sup>38</sup> In that case, the sailor had been properly served, but subsequently went AWOL and did not appear at the proceedings. In another case, a soldier who was AWOL at the commencement of a divorce action, could not later reopen the default judgment by asserting the SSCRA while incarcerated in a county jail. The soldier's continuing AWOL status divested him of SSCRA protection.<sup>39</sup>

In the case of deserters, The Judge Advocate General of the Army has expressed the advisory opinion that deserters are not "persons in the military service of the United States."<sup>40</sup>

In addition, service personnel may not be able to claim protection under the act if the true cause of their inability to act is misconduct such as a self-inflicted injury.<sup>41</sup>

*f. Period of time that the Act covers.* Subsection 101(2) [50 U.S.C. App. § 511] provides that protection of the Act begins on the date on which the person enters active service and additionally provides "it shall end on the date of the person's release

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<sup>36</sup>*Id.* at 639.

<sup>37</sup>*Shayne v. Burke*, 158 Fla. 61, 37 So. 2d 751 (1946).

<sup>38</sup>*Harriott v. Harriott*, 211 N.J. Super. Ch. Div. 445, 511 A.2d 1264 (1986); *see Driver v. Driver*, 35 Conn. 229, 416 A.2d 705 (Super. Ct. 1980).

<sup>39</sup>*Marriage of Hampshire*, 261 Kan. 854, 934 P.2d 58 (1997). *See also U.S. v. Hampshire*, 95 F.3d 999 (10th Cir. 1996).

<sup>40</sup>*See, e.g., JAGA 1952/3654* (22 April 1952).

<sup>41</sup>*Burbach v. Burbach*, 651 N.E.2d 1158 (Ind. Ct. App., 1995).

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from active service<sup>42</sup> or death while in active service, but in no case later than the date when this Act ceases to be in force."

Other sections of the Act, however, qualify this "period of military service." For example, sections 200 and 201 provide additional periods ranging from 30 to 90 days after the termination of all military service to assert rights protected by the Act. On the opposite end of the spectrum, section 106 back-dates the coverage of Articles I, II, and III of the Act to persons who receive orders to report for induction and to Reservists from the date they receive orders to report for active duty.

It is important to know exactly when the particular protection ends. In a 1995 case, a former soldier waited 2 years and 1 day after discharge to file a tort action. The applicable statute of limitations was 2 years. The court dismissed the suit holding that the SSCRA provision tolling statutes of limitation expired on the last day of active duty, not the following day (the first day of civilian status).<sup>43</sup>

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<sup>42</sup>Diamond v. United States, 344 F.2d 703, 170 Ct. Cl. 166 (1965) (release from active duty terminates period of military service, and section of Act which halted operation of statute of limitations during period of military service was not applicable after release from active duty).

<sup>43</sup>Hamner v. BMY Combat Systems, 874 F. Supp. 322, 323 (D. Kan., 1995).

## **2-3. Territorial Application; Jurisdiction of Courts; and Form of Procedure**

### **Section 102**

(50 U.S.C. App. § 512)

(1) The provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court.

*a. General application.* It is not clear whether Congress intended, by the language of the first clause of section 102(1), to make the Act specifically applicable to the governments of the geographical areas mentioned or merely to delineate those areas within which the Act would have operative force. The question is now, however, of small importance. The provisions of the Act were held applicable to the governments and the territories of the geographical areas listed in the statute.

The Attorney General of the United States early advised the Secretary of Agriculture in unequivocal terms that the Soldiers' and Sailors' Civil Relief Act of 1940 is applicable to all agencies of the Federal government. In so doing, the Attorney General recognized, but did not decide between, the two possible interpretations of the statutory language. Instead, he invoked the rule of construction that a sovereign is bound by a statute when the sovereign is a chief party of interest in the statute. The Attorney General recognized this rule as an exception to the general rule of statutory construction that the sovereign is not bound by its own statutes.<sup>44</sup>

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<sup>44</sup>40 Ops Att'y Gen 97 (1941).

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The courts have applied the provisions of the Act to the United States without exception,<sup>45</sup> as well as to state<sup>46</sup> and municipal governments.<sup>47</sup>

Additionally, State courts have applied the Act in its entirety, regardless of whether a particular provision under which relief is sought has no counterpart in state law.<sup>48</sup>

*b. Judicial proceedings.* The second clause of section 102(1) makes the Act applicable to proceedings commenced in any court within a geographical area over which the United States has jurisdiction. Section 101(4) defines the term "court" as any competent Federal or State court, whether or not it is a court of record. The third clause of section 102(1) allows courts to handle proceedings involving the Act either by use of "the usual forms of procedure" or "under such regulations as may be by them prescribed." For purposes of Federal jurisdiction, however, the Act does not generally present a Federal question. In *Davidson v. General Finance Corporation*,<sup>49</sup> the court held that an action against a finance company for alleged fraudulent conversion of an automobile sold at a sheriff's sale, following the company's foreclosure of a conditional sales contract, was a common-law action only incidentally involving the Act. In *Garramone v. Romo, et. al.*,<sup>50</sup> a plaintiff asserted his rights under the SSCRA as part of a civil rights action under 42 U.S.C. Section 1983. The SSCRA, while not a jurisdictional statute, may be effectively combined with other causes of action as an

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<sup>45</sup>See, e.g., *Edmonston v. United States*, 140 Ct. Cl. 199, 155 F. Supp. 553 (1957) (Tucker Act); *Berry v. United States*, 130 Ct. Cl. 33, 126 F. Supp. 190 (1954), *cert. denied*, 349 U.S. 938 (1955) (Tucker Act); *cf. Abbattista v. United States*, 95 F. Supp. 679 (D.N.J. 1951) (Suits in Admiralty Act).

<sup>46</sup>*Parker v. State*, 185 Misc. 584, 57 N.Y.S.2d 242 (Ct. Cl. 1945).

<sup>47</sup>*Calderon v. City of New York*, 184 Misc. 1057, 55 N.Y.S.2d 674 (Sup. Ct. 1945).

<sup>48</sup>*New York Life Ins. Co. v. Litke*, 181 Misc. 32, 45 N.Y.S.2d 576 (1943). See also *State v. Goldberg*, 161 Kan. 174, 166 P.2d 664 (1946).

<sup>49</sup>*Davidson v. General Finance Corp.*, 295 F. Supp. 878 (D. Ga. 1968).

<sup>50</sup>*Garramone v. Romo, et. al.*, 94 F.3d 1446 (10th Cir. 1996).



equitable argument. In the recent case of *Moll v. Ford Consumer Finance Co., Inc.*,<sup>51</sup> a federal court has ruled that service members may have a private cause of action against creditors that refuse to voluntarily apply the six percent interest cap [50 U.S.C. appx. § 526] when requested, “because otherwise the relief would [be] of no value at all.”<sup>52</sup>

With the exception of section 205, the Act makes no reference to administrative proceedings. In those few cases where this issue has been raised, it appears that administrative proceedings are not covered by the Act. For example, in *Polis v. Creedon*<sup>53</sup> the court held that a proceeding before an area rent director was not a proceeding before a court and that a landlord in the military service had no protection under the Act. Unquestionably, however, section 205 of the Act, which suspends the running of the statute of limitations while a member is in the military service, is applicable in administrative proceedings.<sup>54</sup>

The SSCRA does not empower district courts to collaterally review, vacate or impede decisions of state courts.<sup>55</sup>

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<sup>51</sup> *Moll v. Ford Consumer Finance Co., Inc.*, No. 97 C 5044, 1998 U.S. Dist. LEXIS 3638 N.D. Ill. Mar. 23, 1998). *See also* Lieutenant Colonel Conrad, *Federal Court Rules That Military Members Have a Private Cause of Action Under the Soldiers' and Sailors' Civil Relief Act*, ARMY LAW., Jul. 1998, at 63, and *Marin v. Citibank, N.A.*, No. 98-7976, 2000 U.S. App. LEXIS 3789, at \*4 (2d Cir. Mar. 10, 2000) (court suggests that certain sections of the SSCRA may create a private cause of action).

<sup>52</sup> *Moll*, 1998 U.S. Dist. LEXIS 3638, at \*14.

<sup>53</sup> *Polis v. Creedon*, 162 F.2d 908 (Em. App. 1947) *accord*, *Hanebuth v. Scott*, 111 Colo. 443, 142 P.2d 1008 (1943), *modified*, 115 Colo. 176, 170 P.2d 530 (1946); *Hanebuth v. Patton*, 111 Colo. 447, 142 P.2d 1010 (1943), *modified*, 115 Colo. 166, 170 P.2d 526 (1946). (These companion cases dealt with administrative, departmental police hearings). *But see* *Kentucky Unemployment Compensation Comm'n v. Chenault & Orear*, 295 Ky. 562, 174 S.W.2d 767 (1943) (dictum). *See also* *United States v. Frantz*, 220 F.2d 123, (3d Cir.), *cert. denied*, 349 U.S. 954, 75 S. Ct. 883, 99 L. Ed. 1278 (1955).

<sup>54</sup> *Shell Oil Co. v. Industrial Comm'n*, 407 Ill. 186, 94 N.E.2d 888 (1950) (filing of workmen's compensation claim).

<sup>55</sup> *Shatswell v. Shatswell*, 758 F. Supp. 662 (D. Kan. 1991). *See also* *Scheidigg v. Dept. of Air Force*, 715 F. Supp. 11 (D.N.H. 1989), *aff'd*, 915 F.2d 1558 (1st Cir. 1990).

**2-4. Persons Liable on Service Member's Obligation**

Section 103

(50 U.S.C. App. § 513)

(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, accommodation makers, and others, whether primarily or secondarily subject to the obligation or liability, the performance or enforcement of which is stayed, postponed or suspended.

(2) When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, endorser, accommodation maker, or other person whether primarily or secondarily liable upon the contract or liability for the enforcement of which the judgment or decree was entered.

(3) Whenever, by reason of the military service of a principal upon a criminal bail bond the sureties upon such bond are prevented from enforcing the attendance of their principal and performing their obligation the court shall not enforce the provisions of such bond during the military service of the principal thereon and may in accordance with principles of equity and justice either during or after such service discharge such sureties and exonerate the bail.

(4) Nothing contained in this Act shall prevent a waiver in writing of the benefits afforded by subsections (1) and (2) of this section by any surety, guarantor, endorser, accommodation maker, or other person whether primarily or secondarily liable upon the obligation or liability, except that no such waiver shall be valid unless it is executed as an instrument separate from the obligation or liability in respect of which it applies, and no such waiver shall be valid after the beginning of the period of military service if executed by an individual who subsequent to the execution of such waiver becomes a person in military service, or if executed by a dependent of such individual, unless executed by such individual or dependent during the period specified in section 106.

*a. Primarily and secondarily.* Sections 103(1) and 103(2) provide those persons who are either primarily or secondarily liable with a service member on an obligation or liability with the same rights to delay actions and vacate judgments available to service members. Specifically, these sections allow the court in its

discretion to grant stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, accommodation makers, and others.

In considering whether to grant the stay to a co-obligor, the courts have applied a number of tests. In *Modern Industrial Bank v. Zaentz*<sup>56</sup> the court specified that co-obligors are entitled to a stay only if the service member is a party to the action and the action has been stayed as to the service member. In *Tri-State Bonding Co. v. State*<sup>57</sup> the court held that a surety could not obtain a stay unless he could show that the principal was in the military service on the date the principal was scheduled to appear, that an unsuccessful effort to secure the principal's appearance had been made, and that the principal's military service prevented his attendance on that date. Finally, a Georgia court held that where liability is joint and several and the action is brought against an accessible civilian party, the proceedings will not be stayed unless the service member is a party to the action.<sup>58</sup>

In exercising their discretion "the courts are primarily influenced by two considerations: first, whether the man in service is able to appear and defend, and second, whether a default on an obligation by reason of the change in his income will lead to an unjust forfeiture."<sup>59</sup> The right to open a judgment taken against a person in the military service is reserved to that person only and is not available to a judgment co-debtor.<sup>60</sup>

Courts differ concerning the propriety of granting stays when the defendant service member is protected by insurance and might be considered as only nominally a party to the suit. In *Boone v. Lightner*,<sup>61</sup> the Supreme Court recognized this problem when it stated that: "a nominal defendant's absence in the military service . . . might be urged by the insurance company, *the real defendant*, as a grounds for deferring the trial until

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<sup>56</sup>*Modern Indus. Bank v. Zaentz*, 177 Misc. 132, 29 N.Y.S.2d 969 (N.Y. City Mun. Ct. (1941)).

<sup>57</sup>*Tri-State Bonding Co. v. State*, 567 S.W.2d 937 (Ark. 1978).

<sup>58</sup>*Hartsfield Co. v. Whitfield*, 71 Ga. App. 257, 30 S.E.2d 648 (1944). *But see* *Akron Auto Fin. Co. v. Stonebraker*, 66 Ohio App. 507, 35 N.E.2d 585 (1941).

<sup>59</sup>*Note*, 9 U. Chi. L. Rev. 348, 349 (1942).

<sup>60</sup>*J. C. Penney v. Oberpidler*, 163 S.W.2d 1067 (Tex. Civ. App. 1942), *rev'd on another ground*, 141 Tex. 128, 170 S.W.2d 607 (1943).

<sup>61</sup>*Boone v. Lightner*, 319 U.S. 561, 569, *reh'g denied*, 320 U.S. 809 (1943) (emphasis added).

after the war”.<sup>62</sup> In those cases where the issue has been litigated, the courts have taken several approaches: (1) granting the stay,<sup>63</sup> (2) granting the stay on condition that the insurer post a bond,<sup>64</sup> or (3) simply denying the stay on the grounds that an insurance company should not be permitted to use the protection of the Act as a shield to postpone or escape liability.<sup>65</sup> In one instance, the court agreed that it could grant stays of proceedings to sureties, guarantors, and other persons primarily or secondarily liable when proceedings have been stayed as to one in the military service. The court determined, however, that a stay is not warranted in the cases of primary or secondary obligors unless it is apparent that denial of the stay would leave the civil rights of the person in the military service unprotected.<sup>66</sup> More recently, an appellate court reversed a trial court that refused a stay to a service member when the limit of his insurance coverage was less than the amount demanded by the plaintiff.<sup>67</sup> Another court concluded, however, that it was an abuse of discretion to deny a request for continuance even though the plaintiff would enforce any judgment recovered only against the proceeds of the insurance policy.<sup>68</sup> The modern trend is for courts to look to the “real defendant”, and deny SSCRA stay coverage to military member defendants where the plaintiff has agreed to limit tort recovery to defendant insurance policy coverage limits.<sup>69</sup> A well-reasoned opinion in this area is *Tabor v. Miller*.<sup>70</sup> In that

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<sup>62</sup>*Id.*

<sup>63</sup>*Craven v. Vought*, 43 Pa. D. & C. 482, 4 Mon. Leg. R. 11, 55 York Leg. Rep. 173 (1941).

<sup>64</sup>*Royster v. Lederle*, 128 F.2d 197 (6th Cir. 1942). *Cf. Childers v. Nicolopoulos*, 296 F. Supp. 547 (D.C. Okla. 1969) (defendant not required to post bond although stay had previously been granted). *See also Swiderski v. Moodenbaugh*, 45 F. Supp. 790 (D. Ore. 1942).

<sup>65</sup>*Laperouse v. Eagle Indem. Co.*, 202 La. 686, 12 So. 2d 680 (1942).

<sup>66</sup>*Register v. Bourguin*, 203 La. 825, 14 So. 2d 673 (1943).

<sup>67</sup>*Cox v. Yates*, 96 Ga. App. 466, 100 S.E.2d 649 (1957).

<sup>68</sup>*Rutherford v. Bentz*, 345 Ill. App. 532, 104 N.E.2d 343 (1952).

<sup>69</sup> *Underhill v. Barnes*, 288 S.E.2d 905 (Ga. Ct. App. 1982); *Hackman v. Postel*, 675 F. Supp. 1132 (N.D. Ill. 1988).

<sup>70</sup>*Tabor v. Miller*, 369 F. Supp. 647 (D. Pa.) *aff'd*, 389 F.2d 645 (3d Cir.), *cert. denied*, *Stearns v. Tabor*, 391 U.S. 915, 88 Sup. Ct. 1810, 20 L. Ed. 2d 654 (1968) (defendant did not state that it would be impossible for him to appear at trial, and did not suggest that trial be held during his Christmas leave).

case, although a motion for continuance was ostensibly made on behalf of the military member, the court held that the real party in interest was the service member's insurance carrier. In reaching this decision the court noted that although the plaintiff's claim exceeded the service member's policy limits, his insurance carrier had rejected a settlement offer within those limits. The court concluded that the service member's absence had not materially affected the conduct of his defense, and upheld the lower court's decision to deny the requested continuance.

*b. Codefendants.* As previously indicated, a proceeding stayed as to a service member may also be stayed as to others primarily or secondarily subject to the same liability. In section 204, however, the Act allows a court to proceed against other codefendants, notwithstanding a stay as to the service member.

A Washington state appellate court was presented with the problem of a service member driving a vehicle owned by his father. They were named as codefendants in a negligence action. The incident giving rise to the suit was witnessed only by the plaintiff and the absent service member-son. The trial court stayed the proceedings as to the son but denied a stay to the father, who was independently liable under the doctrine of imputed negligence. The appellate court held that the denial was within the trial court's discretion.<sup>71</sup>

*c. Criminal bail bond sureties.* The language of section 103(3) prescribes that the court "shall not enforce the provisions of a criminal bail bond during the military service of the principal" and "may in accordance with the principles of equity and justice either during or after such service discharge such sureties and exonerate the bail." In *United States v. Jeffries*<sup>72</sup> the court held that because there was no doubt that the principal was in the military, it was without authority to forfeit the bail bond and issue a warrant of arrest. Subsection 103(3) was mandatory in that case. A New York court took this one step further and held the bond could not be forfeited if the principal was in the service even if he were on furlough at the time he

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<sup>71</sup>State *ex rel.* Frank v. Bunge, 16 Wash. 2d 358, 133 P.2d 515 (1943).

<sup>72</sup>United States v. Jeffries, 140 F.2d 745 (7th Cir. 1944).

was required to appear.<sup>73</sup> In *Ex Parte Moore*,<sup>74</sup> however, an Alabama court concluded that military service alone was insufficient to prevent forfeiture of the bail bond without a further showing that military service prevented the principal from attending the trial. In this regard, state courts will ordinarily require the surety not only to show that the principal is in the military, but also to demonstrate an effort to secure the principal's attendance.<sup>75</sup> In cases in which the principal was discharged four months before default<sup>76</sup> or was not inducted until almost six months after he was required to appear,<sup>77</sup> the surety could not avoid forfeiting the bail bond under subsection (3) of this section.

## **2-5. Extension of Benefits to Citizens Serving With Forces of War Allies**

### **Section 104**

(50 U.S.C. App. § 514)

Persons who serve with the forces of any nation with which the United States may be allied in the prosecution of any war in which the United States engages while this Act remains in force and who immediately prior to such service were citizens of the United States shall, except in those cases provided for in section 512, be entitled to the relief and benefits afforded by this Act if such service is similar to military service as defined in this Act, unless they are dishonorably discharged therefrom, or it appears that they do not intend to resume United States citizenship.

Sections 104 and 512 of the Act are basically the same in language and attempt to accomplish the same goals. Section 104 covers all the sections of the Act except those contained in sections 501 to 511 inclusive. Section 512 fills this gap and extends the benefits of these eleven sections in Article V to the same persons as stated in section 104. The only appreciable difference between sections 104 and 512 is that section 512

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<sup>73</sup>People v. Correa, 181 Misc. 1019, 43 N.Y.S.2d 266 (1943).

<sup>74</sup>Ex Parte Moore, 244 Ala. 28, 12 So. 2d 77 (1943).

<sup>75</sup>See, e.g., State v. Benedict, 234 Iowa 1178, 15 N.W.2d 248 (1944); People v. Continental Gas Co., 284 App. Div. 944, 134 N.Y.S.2d 742 (1954), *rev'd* 205 Misc. 5, 126 N.Y.S.2d 127 (Sup. Ct. 1953); Cumbie v. State, 367 S.W.2d 693 (Tex. Civ. App. 1963).

<sup>76</sup>United States v. Carolina Gas Ins. Co., Ill., 237 F.2d 451 (7th Cir. 1956).

<sup>77</sup>State v. Benedict, 234 Iowa 1178, 15 N.W.2d 248.

extends the benefits of sections 501-511 to those who die in the service of the armed forces of an allied nation or who die as a result of such service while section 104 does not.

The thrust of sections 104 and 512 is to allow those persons who serve in the armed forces of nations that are allied with the United States in the prosecution of war against a common enemy to receive the protective features of the Act to the same extent as soldiers in the armed forces of the United States.

Both sections contemplate that those who serve in allied armed forces will resume citizenship sometime after their service with these allied forces. In a set of circumstances involving section 104, a United States citizen serving in a foreign armed force allied to the United States in the prosecution of any war would get the benefits of all the sections of the Act, with the exception of sections 501 to 511, as long as he/she received an honorable discharge from the allied armed force. Arguably, the present statutory requirement of section 104 that the former citizen must intend to resume United States citizenship before section 104 would be operative could be avoided as a result of the Supreme Court decision in *Afroyim v. Rusk*.<sup>78</sup> Section 512 of the Act would likewise be affected.

## **2-6. Extension of Benefits to Persons Ordered to Report for Induction or Military Service**

### Section 106

(50 U.S.C. App. § 516)

Any person who has been ordered to report for induction under the Military Selective Service Act (50 U.S.C. App. § 451 *et seq.*), as amended, shall be entitled to the relief and benefits accorded persons in military service under articles I, II, and III of this Act during the period beginning on the date of receipt of such order and ending on the date upon which such person reports for induction; and any member of a Reserve Component of the Armed Forces who is ordered to report for military service shall be entitled to such relief and benefits during the period beginning on the date of receipt of such order and ending on the date upon which such member reports for military service or the date on which the order is revoked, whichever is earlier.

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<sup>78</sup>*Afroyim v. Rusk*, 387 U.S. 253 (1967) (Congress has no power under the Constitution to divest a person of his United States citizenship absent his voluntary renunciation thereof).

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Congress added section 106 to the Act in 1942 with the express intent of providing draftees and enlisted reservists ordered to active duty with the benefits of the first three articles of the Act [50 U.S.C. §§ 510-36 (1946)] in the period between the time they received orders to active duty and the time when they reported for duty. The Selective Training and Service Act of 1940, as amended, and mentioned in section 106, has been replaced by similar updated provisions. The 1991 amendments provided coverage to any member of a Reserve Component, officer as well as enlisted, from the time he or she received orders to report for active duty.

Persons ordered to active duty under the draft law report in accordance with the Military Selective Service Act.<sup>79</sup> An individual ordered to report for induction is within the purview of section 106 even though the induction process has not been completed.<sup>80</sup>

### **2-7. Waiver of Benefits of the Act**

#### **Section 107**

(50 U.S.C. App. § 517)

Nothing contained in this Act shall prevent--

(a) the modification, termination, or cancellation of any contract, lease, or bailment or any obligation secured by mortgage, trust, deed, lien, or other security in the nature of a mortgage, or

(b) the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property which is security for any obligation or which has been purchased or received under a contract, lease, or bailment,

pursuant to a written agreement of the parties thereto including the person in military service concerned, or the person to whom section 106 [App. § 516] is applicable, whether or not such person is a party to the obligation), or their assignees, executed during or after the period of military service of the person concerned or during the period specified in section 106 [App. § 516].

Congress added this section of the Act in 1942. It was designed to induce service members and their creditors to adjust their rights privately and to make it clear that no

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<sup>79</sup>50 U.S.C. App. §§ 451, 453, 454, 455, 456, 458-471a (1994).

<sup>80</sup>*See, e.g.,* Clements v. McLeod, 155 Fla. 860, 22 So. 2d 220 (1945); J.C.H. Serv. Station v. Patrikes, 181 Misc. 401, 46 N.Y.S.2d 288 (1944); Ostrowski v. Barczynski, 45 Pa. D. & C. 451, 24 Erie County L.J. 221(1942).



restrictions have been placed upon the usual right of the parties to re-negotiate an obligation. This section expressly permits foreclosures.<sup>81</sup>

While service members might waive, in writing, certain benefits of the Act, they do not thereby waive all other rights under the Act. For example, re-negotiating a conditional sales contract will not waive the right, in the event of default, to regain possession as prescribed by sections 301 and 303.<sup>82</sup> Additionally, when litigating the legality of the seizure, the service member does not waive the tolling of the statute of limitations as provided by section 205 of the Act.<sup>83</sup> Finally, an agreement by a service member to waive SSCRA rights pursuant to a divorce decree, does not waive SSCRA rights to any subsequent litigation to enforce or interpret the divorce decree.<sup>84</sup> Such a waiver must be foreseeable, voluntary, and intentional.<sup>85</sup>

## **2-8. Transfers to Take Advantage of the Act**

### Section 600

(50 U.S.C. App. § 580)

Where in any proceeding to enforce a civil right in any court it is made to appear to the satisfaction of the court that any interest, property, or contract has since October 17, 1940, been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of this Act, the court shall enter such judgment or make such order as might lawfully be entered or made, the provisions of this Act to the contrary notwithstanding.

This section emphasizes the equitable nature of the Act and is designed to prevent its abuse. Debtors who are ineligible to receive the benefits of the Act are deprived of the opportunity to secure these benefits through colorable transfers or assignments to persons who are or may become service members.

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<sup>81</sup>Brown v. Gerber, 495 P.2d 1160 (Colo. 1972) (permitting foreclosure of trust deed on encumbered property acquired after purchaser had commenced his period of military service).

<sup>82</sup>S & C Motors v. Carden, 223 Ark. 164, 264 S.W.2d 627 (1954).

<sup>83</sup>Harris v. Stem, 30 So. 2d 889 (La. App. 1947).

<sup>84</sup>Murdock v. Murdock, 526 S.E.2d 241, 247 (S.C. 1999).

<sup>85</sup>*Id.*

The pivotal issue in the few decisions interpreting this section is the existence of an intent to delay or defeat the enforcement of rights. A court in Oklahoma held that reassignment of an interest in an oil and gas lease containing a nine month drilling provision to a person who had received orders to active duty, 6 weeks before reporting, was a transfer to take advantage of the Act.<sup>86</sup> Similarly, when a corporation transferred mortgaged real estate, upon which it had not met previous payments, to one of its owners and officers on the day he entered military service, the court denied protection under the Act.<sup>87</sup>

## **2-9. Certification of Period of Military Service--Treatment of Missing Persons**

### **Section 601**

(50 U.S.C. App. § 581)

(1) In any proceeding under this Act a certificate signed by The Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army of the United States, signed by the Chief of Naval Personnel as to persons in the United States Navy or in any branch of the United States service while serving pursuant to law with the United States Navy, and signed by the Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them, respectively, for the purpose, shall when produced on prima facie evidence as to any of the following facts stated in such certificate:

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and the place where such person died in or was discharged from such service.

(2) It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face

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<sup>86</sup>Lima Oil & Gas Co. v. Pritchard, 92 Okla. 113, 218 Pac. 863 (1923) (1918 Act).

<sup>87</sup>Ninth Fed. Sav. & Loan Ass'n v. Parkway West Corp., 182 Misc. 919, 48 N.Y.S.2d 762 (Sup. Ct. 1943), *cf.* Sullivan v. State Bar, 28 Cal. 2d 488, 170 P.2d 888 (1946).

of the certificates to have been so authorized shall be prima facie evidence of its contents and of the authority of the signer to issue the same.

(3) Where a person in military service has been reported missing he shall be presumed to continue in the service until accounted for, and no period herein limited which begins or ends with the death of such person shall begin or end until the death of such person is in fact reported to or found by the Department of Defense, or any court, or board thereof, or until such death is found by a court of competent jurisdiction. No period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the time when this Act ceases to be in force.

In a proceeding involving section 205 of the Act, a properly authenticated certificate of service in the United States Marine Corps was prima facie evidence of the fact of the service.<sup>88</sup> Subsection 601(3) creates the presumption that when persons in the military service are reported missing, they will be deemed to have continued in the service until they are accounted for.

Cases involving missing persons, affected by section 601(3), should be viewed in conjunction with Chapter 10 of Title 37, United States Code.<sup>89</sup>

## **2-10. Power of Attorney**

### Section 701

(50 U.S.C. App. § 591)

(a) Extension for period person in missing status.

Notwithstanding any other provision of law, a power of attorney which--

(1) was duly executed by a person in the military service who is in a missing status (as defined in section 551(2) of Title 37, U.S. Code);

(2) designates that person's spouse, parent, or other named relative as his attorney in fact for certain specified, or all, purposes; and

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<sup>88</sup>Betha v. Martin, 188 F. Supp. 133, 134 (E.D. Pa. 1960); Van Doeran v. Pelt, 184 S.W.2d 744 (Mo. App. 1945).

<sup>89</sup>37 U.S.C.A. §§ 551-559 (West 2000).

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(3) expires by its terms after that person entered a missing status, and before or after the effective date of this section; shall be automatically extended for the period that the person is in a missing status.

**(b) Limitation on extension.**

No power of attorney executed after the effective date of this section by a person in the military service may be extended under subsection (a) of this section if the document by its terms clearly indicates that the power granted expires on the date specified even though that person, after the date of execution of the document, enters a missing status.

**(c)** This section applies to the following powers of attorney executed by a person in military service or under a call or order to report for military service (or who has been advised by an official of the Department of Defense that such person may receive such a call or order):

(1) a power of attorney that is executed during the Vietnam era (as defined in section 101(29) of Title 38, United States Code).

(2) a power of attorney that expires by its terms after July 31, 1990.

### **2-11. Revocation of Interlocutory Orders**

#### **Section 602**

**(50 U.S.C. App. § 582)**

Any interlocutory order made by any court under the provisions of this Act may, upon the court's own motion or otherwise, be revoked, modified, or extended by it upon such notice to the parties affected as it may require.

The wording of this section is straightforward and unambiguous. It permits a court that has issued an interlocutory order under any of the sections of the Act to revoke, modify, or extend such an order on its own motion or otherwise. This section has relevance when read together with other sections that allow a court to grant certain relief and then allow the court to make "such other orders as may be just." For example, section 300, which deals with eviction and distress, allows a court to grant a three-month stay of eviction proceedings or to "make such other orders as may be just." Thus, the court could issue whatever interlocutory orders its rules of procedure allowed in such a proceeding if it found that such an order would be "just" to all the parties involved. The language in section 300 appears to authorize the kind of interlocutory order contemplated by Congress in section 602 of the Act. Sections 200, 301, 302, and 305 are other sections of the Act that contain language that allows a court to issue interlocutory orders. Those orders also can be "revoked, modified, or extended" by section 602.

**2-12. Separability of Provisions**

Section 603

(50 U.S.C. App. § 583)

If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

**2-13. Termination Date**

Section 604

(50 U.S.C. App. § 584)

This Act shall remain in force until May 15, 1945, except that should the United States be then engaged in a war, this Act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter. Whenever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided with respect to military service performed prior to the date herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of such proceeding, remedy, privilege, stay, limitation, accounting, or other transaction.

The Soldiers' and Sailors' Civil Relief Act was to end on the later of the following two dates: 15 May 1945 or six months after a treaty of peace ending World War II was proclaimed by the President of the United States. In 1948, as an added provision of the Universal Military Training and Service Act, Congress stated that the Soldiers' and Sailors' Civil Relief Act was to continue in force until it was "repealed or otherwise terminated by a subsequent Act of Congress...."<sup>90</sup>

Congress has not repealed or terminated the Soldiers' and Sailors' Civil Relief Act of 1940 and, therefore, the Act continues in effect.

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<sup>90</sup>50 U.S.C. App. § 464 (1994).



## **Chapter 3**

### **General Relief: Default Judgments, Affidavits, Bonds, Attorneys for Persons in Service, Stays of Proceedings, Statute of Limitations, Interest Rates**

#### **3-1. Purpose and Scope**

This chapter examines the general relief provisions of the Act applicable when a default judgment is taken or sought against a service member whose ability to participate in the judicial proceeding is materially affected by military service.

#### **3-2. Procedure Upon Default by Defendant**

Section 200(1)

(50 U.S.C. App. § 2020)

In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service, the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act. Whenever, under the laws applicable with respect to any court, facts may be evidenced, established, or proved by an unsworn statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury, the filing of such an unsworn statement, declaration, verification, or certificate shall satisfy the requirement of this subsection that facts be established by affidavit.

*a. Affidavit.* Section 200(1) of the Act provides that before judgment in any action in any court, if there is a default of any appearance by the defendant, the plaintiff must file an affidavit stating facts showing whether the defendant is in military service.

(1) *When required.* The Act is clear that this subsection applies to any civil action or proceeding in any court. There has been little controversy on this point, although one Ohio decision ruled that presentation of a will for probate was not an adversary proceeding and interested parties need

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not appear before the court. Therefore, the court did not require an affidavit by the plaintiff (petitioner) when the minor son of the deceased was in military service.<sup>1</sup> The court held that the Soldiers' and Sailors' Civil Relief Act applies when service members are sued as defendants but does not apply to "in rem" proceedings that are not against named defendants.<sup>2</sup> Nevertheless, the great majority of decisions have included probate cases within the scope of this subsection.<sup>3</sup>

The plaintiff must file an affidavit where there is a default of any appearance by the defendant. The courts have agreed that "any appearance" means any appearance whatsoever.<sup>4</sup> Defendants have argued that they could appear specially for the purpose of testing the court's jurisdiction without losing the benefits of this section. In one response to this argument, the court stated: "[t]he benefits of [50 U.S.C. App.] section 520 are made to depend on an absence of any appearance, which includes a special as well as a general appearance. So, whether the appearance made was special or general is not material to the question."<sup>5</sup> In dealing with the question of the meaning of "any appearance," another court held:

Consideration of the meaning of the phrase "any appearance" is sometimes required. The 1918 Act used the words "an appearance" but in the 1940 Act the phrase was broadened to read "any appearance". The word "appearance" is defined in Webster's New Int. Dict. 2d Ed., 1940, as meaning in law, "the coming into court of a party summoned in an action either by himself or by his attorney." Technically there are several different kinds and methods of appearance. See Am Jur, appearances, section 1, etc. A default of any appearance by the defendant means a default in any one of several ways of making an appearance. "Any" applies to every individual part without distinction.<sup>6</sup>

It appears that any act before the court by a defendant-service member, or the defendant's attorney, will constitute an appearance depriving the service member of the benefits of section 200. In *Blankenship v. Blankenship*,<sup>7</sup> defendant's counsel filed an affidavit asking the court to quash the complaint and the

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<sup>1</sup>Case v. Case, 124 N.E.2d 856 (Ohio Probate Ct. 1955).

<sup>2</sup>*Id.*

<sup>3</sup>See, e.g., *In re Ehlke's Estate*, 250 Wisc. 583, 27 N.W.2d 754 (1947); *In re Cool's Estate*, 19 N.J. Misc. 236, 18 A.2d 714 (1941); *Lavender v. Gernhart*, 201 Md. 92, 92 A.2d 751 (1952); *In re Larson*, 81 Cal. App. 2d 258, 183 P.2d 688 (1947).

<sup>4</sup>See, e.g., *Blankenship v. Blankenship*, 263 Ala. 297, 82 So. 2d 335 (1955); *Reynolds v. Reynolds*, 21 Cal. 2d 580, 134 P.2d 251 (1943); *In re Cool's Estate*, 19 N.J. Misc. 236, 18 A.2d 714.

<sup>5</sup>*Blankenship v. Blankenship*, 263 Ala. at 303, 82 So. 2d at 340. See also *Cloyd v. Cloyd*, 564 S.W.2d 337 (Mo. App. 1978).

<sup>6</sup>*In re Cool's Estate*, 19 N.J. Misc. at 238, 18 A.2d at 716-17.

<sup>7</sup>*Blankenship v. Blankenship*, 263 Ala. 297, 82 So. 2d 335 (1978).



service or continue the cause. In *Reynolds v. Reynolds*<sup>8</sup> the defendant's counsel filed a motion to dismiss for lack of jurisdiction. In *Vara v. Vara*<sup>9</sup> the defendant filed a motion to quash service. In each of these cases, the court held that the service member made an appearance.

Upon receiving service of process in an overseas area, a service member sometimes writes a letter to the court or sends a telegram asking for protection under the Act. Such an informal communication should not be classified as an "appearance" by the courts.<sup>10</sup> The same is true of a legal-appearing document prepared by a military legal assistance officer and mailed to the court.<sup>11</sup> In practice, however, at least two state courts have held that a letter from a legal assistance attorney invoking the Act and requesting a stay constituted an appearance.<sup>12</sup> This appearance waived the service member's protection against a default judgment.

The requirement for the court to appoint an attorney to represent a defaulting defendant-service member is discussed later in this chapter. Nothing a court appointed attorney does personally can amount to an appearance on behalf of a service member, as far as the provisions of section 200 are concerned.<sup>13</sup> This is true for two reasons. First, although counsel is appointed when there is a default of appearance, the appointment does not change that fact; and second, the appointed counsel cannot waive any of the defendant's rights and one of these is the right to apply to reopen a judgment entered in default of appearance.<sup>14</sup>

(2) *Content.* Subsection 200(1) states that the plaintiff's affidavit shall set forth facts showing that the defendant is not in military service. This should require more than a statement that

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<sup>8</sup>*Reynolds v. Reynolds*, 21 Cal. 2d 580, 134 P.2d 251 (1943).

<sup>9</sup>*Vara v. Vara*, 14 Ohio 2d 261, 171 N.E.2d 384 (1961).

<sup>10</sup>*Rutherford v. Bentz*, 354 Ill. App. 532, 104 N.E.2d 343 (1952); *Marriage of Lopez*, 173 Cal. Rptr. 718, 721 (Cal. App. 1981).

<sup>11</sup>*Bowery Savings Bank v. Pellegrino*, 185 Misc. 912, 58 N.Y.S.2d 771 (Sup. Ct. 1945); *Kramer v. Kramer*, 668 S.W. 457 (Tex. Ct. App. 1984).

<sup>12</sup>*Skates v. Stockton*, 140 Ariz. 505, 683 P.2d 304 (Ariz. Ct. App. 1980); *Artis-Wergin v. Artis-Wergin*, 444 N.W.2d 750 (Wis. Ct. App. 1989) (letter from legal assistance attorney requesting a stay constituted an appearance; letter failed to invoke SSCRA). *But see Kasubuski v. Kasubaski*, 1996 Wis. App. LEXIS 1014 (Wis. Ct. App. 1996) (unpublished) [Court suggests that Artis Wergin was wrongly decided.] *See also* Michael A. Kirtland, *Civilian Representation of the Military C\*L\*I\*E\*N\*T*, 58 ALA. LAW. 288, 289 (Sep. 1997).

<sup>13</sup>*See, e.g., Rutherford v. Bentz*, 345 Ill. App. 532, 104 N.E.2d 343; *In re Ehlke's Estate*, 250 Wisc. 583, 27 N.W.2d 754 (1947).

<sup>14</sup>*See Kerig*, *The Absent Defendant and the Federal Soldiers' and Sailors' Civil Relief Act*, 33 N.Y.U.L. Rev. 975, 981 (1958).

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the defendant is not in the service. Some facts are required before the court will enter a default judgment.<sup>15</sup> If the defendant is in service, the plaintiff should so state in the affidavit. If the plaintiff cannot determine whether defendant is in the service, the plaintiff must so state in the affidavit.

The last provision of subsection 200(1) permits an unsworn statement, declaration, verification, or certificate in writing to take the place of an affidavit as long as it is subscribed and certified or declared to be true under penalty of perjury and is permitted by the rules of court. An Idaho court held that a verified complaint containing statements as to the defendant's military status complied with the statutory requirement for an affidavit. The court stated that the essential element was that the allegation was made under oath.<sup>16</sup> In *United States v. Kaufman*,<sup>17</sup> the court held that documents presented in support of default judgments were an "affidavit" for purposes of prosecution under section 520(2) of the Act, even though the defendant did not actually swear to the written statements.

(3) *Persons protected.* Occasionally, a civilian defendant determines that the plaintiff failed to file an affidavit as to the defendant's military status and alleges that his rights have been violated and the default judgment should be vacated. In this situation, a Michigan court pointed out that plaintiff's failure to file an affidavit of nonmilitary service before taking default judgment did not prejudice defendants who were admittedly not in military service at the time the default was entered.<sup>18</sup> The courts have agreed that the affidavit requirement protects only the military defendant who cannot appear in defense.<sup>19</sup>

(4) *Effect of not filing affidavit.* Subsection 200(1) of the Act spells out several consequences of a plaintiff's failure to file an affidavit of nonmilitary service. If such an affidavit is not filed, a court will not enter default judgment until the plaintiff meets the Act's requirements.<sup>20</sup> Another consequence of failure to file an affidavit is that a subsequent default judgment is voidable and can be reopened at a later date on application by the defendant under

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<sup>15</sup>See *United States v. Simmons*, 508 F. Supp. 552 (E.D. Tenn. 1980) (court required more than a statement that no interested parties were in the military service). See also *Mill Rock Plaza Associates v. Lively*, 580 N.Y.S.2d 815, 153 Misc.2d 254 (N.Y. City Civ. Ct. 1990); *Attorney Grievance Comm'n v. Kemp*, 641 A.2d 510, 515-16 n. 10 (Md. 1994) (Improper non-military service affidavit can lead to disciplinary action); *In re Montano*, 192 B.R. 843 (Br. D. Md. 1996); *United States v. Parsons*, 1997 U.S. Dist. LEXIS 18002 (M.D. Fl. 1997) (unpub.) (a-fidavit must state personal knowledge of the facts, more than "upon information and belief").

<sup>16</sup>*Bedwell v. Bedwell*, 68 Idaho 405, 195 P.2d 1001 (1948).

<sup>17</sup>*United States v. Kaufman*, 453 F.2d 306 (2d Cir. 1971).

<sup>18</sup>*Haller v. Walczak*, 347 Mich. 292, 79 N.W.2d 622 (1956).

<sup>19</sup>See, e.g., *Vision Serv. Plan of Penn. v. Penn. AFSCME Health and Welfare Fund*, 326 Pa. Supr. 474, 474 A.2d 339 (Pa. Super. Ct. 1984); *Poccia v. Benson*, 99 R.I. 364, 208 A.2d 102 (1965).

<sup>20</sup>*Murdock v. Murdock*, 526 S.E.2d 241, 246-247; 1999 S.C. App. LEXIS 189 (S.C. 1999) (Court is without authority to render a judgment absent conformity with the SSCRA affidavit/attorney appointment requirements of 50 U.S.C. App. § 520).

certain conditions.<sup>21</sup> In jurisdictions where few military members reside, counsel often do not file the nonmilitary service affidavit in default cases, as the courts routinely ignore the requirement. This problem exists because very few defendants in those jurisdictions are military members, and if a default is wrongly approved, the judgment may be reopened. Also there are no effective sanctions against attorneys that fail to file the affidavit, or judges that approve default judgments without the nonmilitary service affidavit.<sup>22</sup>

Until a service member moves to reopen, however, the judgment is valid and binding and entitled to recognition under the principles of full faith and credit.<sup>23</sup> In the Ohio case of *Thompson v. Lowman*,<sup>24</sup> the court said,

It will be observed that the filing of the military affidavit is not made a jurisdictional matter. The Act authorizes entry of judgment notwithstanding the absence of the affidavit when an order of court directing such entry has been secured. The failure to file such affidavit does not affect the judgment, and is only an irregularity. . . . When the judgment is rendered without filing the requisite affidavit, the courts have uniformly ruled that the judgment is not void, but only voidable, subject to being vacated at the instance of the service member, but only upon proper showing that he has been prejudiced by reason of his military service in making defense.<sup>25</sup>

*b. Court appointed attorney.* Section 200(1) of the Act requires that if the plaintiff does not file an affidavit showing that the defendant is not in military service, the court shall appoint an

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<sup>21</sup>Akers v. Bonifasi, 629 F. Supp. 1212 (M.D. Tenn. 1984). *But cf.* Interinsurance Exchange Auto. Club v. Collins, 37 Cal. Rptr.2d 126 (Cal. App. 1994) (Clerk of court may not refuse to enter a default on the ground that the plaintiff failed to include an affidavit or declaration of military service with the pleadings, since the SSCRA requires only that the affidavit be entered prior to entry of final default judgment).

<sup>22</sup> Lieutenant Colonel Craig L. Reinold, Note, *The Soldiers' and Sailors' Civil Relief Act: Due Process for Those Who Defend Due Process*, The Army Lawyer, December 1995, at 64; and Major Mary Hostetter, Note, *Using the Soldiers' and Sailors' Civil Relief Act to Your Clients' Advantage*, The Army Lawyer, December 1993, at 34, 38-39.

<sup>23</sup>Courtney v. Warner, 290 So. 2d 101 (Fla. App. 1974).

<sup>24</sup>Thompson v. Lowman, 108 Ohio App. 453, 155 N.E.2d 258, *aff'g*, 155 N.E.2d 250 (Ohio C.P. 1958).

<sup>25</sup>*Id.* at 456, 155 N.E.2d at 261. *See also* Hernandez v. King, 411 So.2d 758 (La. Ct. App. 1982); Krumme v. Krumme, 6 Kan. App. 2d 939 (Ct. App. 1981); Unsatisfied Claim and Judgment Fund Bd. of Fortney, 264 Md. 246, 285 A.2d 641 (1972); Davidson v. General Finance Corp., 295 F. Supp. 878, (N.D. Ga. 1968).

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attorney to represent the defendant and to protect defendant's interests before entering a default judgment. The 1960 amendments to the Act changed this wording from "may appoint" to "shall appoint," making this a mandatory requirement.<sup>26</sup> The sentence in subsection 200(1), which requires the court to appoint an attorney, also contains the phrase, "if the defendant is in such service." When the plaintiff files an affidavit stating that defendant is in service, or stating that plaintiff is unable to determine if defendant is in service, the court must make findings as to whether defendant is in military service. Then, if the defendant is in service, the court must appoint an attorney.

None of these provisions apply unless the defendant has defaulted of any appearance whatsoever. Therefore, if the defendant has appointed an attorney to represent him/her in the case, this section will not apply. For example, the California Supreme Court held that the provisions of this section were designed to protect defendants in military service who do not appear by ensuring appointment of attorneys to represent them. The section did not protect a defendant who had appointed his own attorneys to protect his interests.<sup>27</sup> An interesting situation can arise when a service member retains an attorney from previous, related litigation. In such a situation, the California court ruled that, where notice of a wife's motion to modify a support order was served upon an absent husband's attorney in the original divorce action, but the attorney stated he was no longer authorized to represent defendant and had not been able to communicate with the husband, it was error to fail to appoint an attorney.<sup>28</sup> Further information in this area appears in paragraph 3.4 of this chapter.

Failure to appoint an attorney pursuant to this section renders the judgment voidable. In *Smith v. Davis*, 364 S.E.2d 156 (N.C. Ct. App. 1988), failure of the trial court to appoint attorney for soldier, without more, did not require reversal but the soldier was entitled to reopen the default judgment because he showed military service materially affected his ability to defend and that he had a meritorious defense.<sup>29</sup> No provision in the SSCRA directs who pays the court appointed attorney.<sup>30</sup> Failure to appoint an attorney is not an abuse of discretion or reversible error unless the respondent can

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<sup>26</sup>50 U.S.C.A. App. § 520 (2000).

<sup>27</sup>*Reynolds v. Reynolds*, 21 Cal. 2d 580, 134 P.2d 251 (1943).

<sup>28</sup>*Allen v. Allen*, 30 Cal. 2d 433, 182 P.2d 551 (1947).

<sup>29</sup> See also *Ostrowski v. Pethick*, 590 A.2d 1290 (Super. Ct. Pa. 1991); *Paternity of T.M.Y. Kevin Nickels*, 725 N.E.2d 997, 1004 (Ind. App. 2000) (Judgment valid until properly attacked by service member).

<sup>30</sup> *State of Alaska ex rel. Dew v. Superior Court*, 907 P.2d 14 (Alaska 1995) (Discussion of payment options for SSCRA counsel); *Barnes v. Winford*, 833 P.2d 756 (Colo. App. 1991) (plaintiff pays for SSCRA counsel); *Dorsey v. McClain*, 562 A.2d 1302, 1304 n.2 (Md. App. 1989) (service member may have to pay); *United States v. Henagan*, 52 F. Supp. 350 (M.D. Ala. 1982); and *Redford v Ramlow*, 27 N.W.2d 754 (Wis. 1947), *reh'g denied*, 28 N.W.2d 884 (Wis. 1947) (Estate pays for SSCRA attorney in will contest).

show that he was prejudiced by the failure to appoint counsel.<sup>31</sup> The failure of the statute to provide a mechanism to compensate appointed counsel, and the lack of sanctions for judges who do not appoint SSCRA counsel to determine military status results in this section often being ignored by civil courts.

*c. Function of the Appointed Attorney.* The SSCRA does not inform the appointed attorney what his or her duties are. Presumably, the attorney is to act as a guardian for the interests of the absent service person. An unpublished opinion in Ohio suggests that the attorney must make a diligent search to find the “client” and determine if the service person wishes to stay the proceedings.<sup>32</sup>

*d. Bond requirement.* In addition to requiring the plaintiff to file the appropriate affidavit and the court to appoint an attorney, subsection 200(1) provides that before entering judgment the court may require plaintiff to file a bond. When it appears that the defendant is in military service the court may require, as a condition to the entry of a default judgment, that the plaintiff file a bond. The face amount of the bond may be used to indemnify the defendant against any loss or damage suffered if the judgment is later set aside. The court is also permitted to make any further order or enter such judgment as in its opinion may be necessary to protect the defendant's rights.

### **3-3. Penalty for False Affidavit**

#### Section 200(2)

#### (50 U.S.C. App. § 520)

Any person who shall make or use an affidavit required under this section, or a statement, declaration, verification, or certificate certified or declared to be true under penalty of perjury permitted under subsection (1), knowing it to be false, shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

Subsection 200(2) provides a criminal sanction for making or using a false affidavit under section 200(1).<sup>33</sup> Filing a false affidavit can also result in attorney disciplinary action for lack of candor before a tribunal.<sup>34</sup> In areas of the country where there are few military members residing, civil plaintiffs

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<sup>31</sup> *Marriage of Lopez*, 173 Cal. Rptr. 718 (Cal. App. 1981) and *Wilson v. Butler*, 584 So. 2d 414 (Miss. 1991) [Although the Plaintiff had failed to file the required nonmilitary affidavit and the trial court failed to appoint an SSCRA counsel, the judgment would not be reopened where the soldier failed to raise a meritorious defense to the paternity action.]

<sup>32</sup> *State v. Smith*, 1994 WL 714505 (Oh. Ct. App., 1994) (unpub.).

<sup>33</sup> *See, e.g., United States v. Kaufman*, 453 F.2d 306 (1971).

<sup>34</sup> *See ABA Model Rules of Professional Conduct Rule 3.3(a)(1)* (1993 ed.). *Cf. In re Meade-Murphy*, 410 S.E.2d 99 (Ga. 1991) (lawyer who filed garnishment affidavits when cases had actually been dismissed violated duty of candor).

simply do not file SSCRA affidavits in default cases, avoiding the false affidavit problem. Despite the clear directive of the SSCRA, many courts routinely grant default judgments even when no affidavit has been filed. Service members generally do not bother to reopen default judgments because of the high cost of attorney representation. Plaintiff's counsel who fail to file a SSCRA affidavit, , but clearly indicate that they are aware that the respondent is in military service, e.g., sending a dunning letter to the service member's commander before initiating suit, violate their ethical obligation to inform the court of the material fact of the respondent's military service, and could be subject to disciplinary action.<sup>35</sup>

### **3-4. Court Appointed Attorney**

#### Section 200(3)

(50 U.S.C. App. § 520)

In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

*a. General.* Subsection 200(3) provides for court appointment of an attorney to represent a service member who is a party to the action and who has not personally appeared therein or been represented by an authorized attorney. This subsection differs from the subsection 200(1) requirement in that this section says the court "may appoint" instead of "shall appoint." This is true because this subsection, 200(3), is not referring to a condition which must exist before a default judgment is entered, but is stating that the court may appoint an attorney at any time during the proceedings. Consequently, several questions have arisen concerning court appointed counsel.

*b. Responsibilities of appointed attorney.* When a plaintiff files an affidavit stating that the defendant is in military service or that the plaintiff cannot determine whether he/she is in military service and an attorney is appointed to represent this missing defendant, what does the attorney do? The attorney is charged by statute with representing the service member and protecting his/her interest. One author has noted that an "appointed attorney is under an obligation to exhaust every reasonable means of establishing contact with the service member prior to trial date so that some logical course of action can be agreed upon."<sup>36</sup> Another writer has indicated that "local court rules . . . sometime provide that the appointed attorney shall inquire into defendant's military status and whether his ability to meet his

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<sup>35</sup> See ABA Model Rules of Professional Conduct Rule 3.3(d) (1993 ed.). Cf. *Egan by Keith v. Jackson*, 855 F. Supp. 765 (E.D. Pa. 1994) (lawyer silently acquiescing in the false statement of an estate guardian breached duty of candor to tribunal). See also Dennis, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 GEO. J. LEGAL ETHICS 157 (1994) (Rule 3.3(d) is unique in imposing an unqualified duty of disclosure on lawyers, and offers untapped potential for use by courts and advocates in search for truth).

<sup>36</sup> Kerig, *supra* note 14 at 980.

debts has been materially affected and then report to the court.<sup>37</sup> A New York court, in appointing such counsel, said it was for the purpose of obtaining facts as to whether the soldier's ability to comply with the terms of the obligation had been materially affected by his military service and to report to the court thereon or move for a stay in the soldier's behalf.<sup>38</sup> In another case, the court stated that the purpose of the appointed counsel, either required or suggested, is to obtain a stay for the defendant.<sup>39</sup> Of course, if the military defendant is geographically and militarily able, he/she may desire to cooperate fully in the defense. This would, then, constitute an appearance and would deprive him/her of the opportunity to apply to reopen the judgment under subsection 200(4). Unless the defendant is able to be present for trial and to testify and fully cooperate in the defense, the primary purpose of the appointed attorney should be to obtain a stay until the defendant can be present. The attorney can make this motion without depriving the defendant of the right to apply to reopen any default judgment that might result.

*c. Compensation of appointed attorney.* When a military defendant has defaulted and the court has appointed an attorney to represent him/her and protect his/her interest, the court must also address the amount of the attorney's fee and the source of payment. As noted above, this provision is often ignored by the courts since the statute does not provide an attorney fee payment mechanism. A New Jersey court opined that:

Ordinarily the services rendered by proctor and counsel so appointed are to be regarded as a patriotic duty for which no compensation would be expected by members of a profession deeply imbued by a sense of public responsibility. Certainly not as against a party in military service. However, in cases in which allowances are commonly made according to the usual probate practice, there seems no good reason why reasonable compensation should not be awarded.<sup>40</sup>

Similarly, the Wisconsin Supreme Court held that the appointed attorney should be paid compensation allowed those in public service and fees ordinarily chargeable between attorney and client.<sup>41</sup>

*d. Acts not binding on defendant.* Subsection 200(3) of the Act also provides that no attorney appointed by the court to represent defendant-service members has power to waive any of the

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<sup>37</sup>Borden, *The Soldiers' and Sailors' Civil Relief Act*, 8 PRAC. LAW. 65, 68 (1962).

<sup>38</sup>*Bowery Savings Bank v. Pellegrino*, 185 Misc. 912, 58 N.Y.S.2d 771 (Sup. Ct. 1945).

<sup>39</sup>*In re Ehlke's Estate*, 250 Wisc. 583, 27 N.W.2d 754.

<sup>40</sup>*In re Cool's Estate*, 19 N.J. Misc. at 239, 18 A.2d at 717. *State of Alaska ex rel. Dew v. Superior Court*, 907 P.2d 14 (Alaska 1995) (discussion of payment options for SSCRA counsel).

<sup>41</sup>*In re Ehlke's Estate*, 250 Misc. 583, 27 N.W.2d 754. In *Barnes v. Winford*, 833 P.2d 756 (Colo. App. 1991), the court said the costs were payable by the plaintiff. In a case involving a will contest, the court appointed attorney was ordered paid from the estate just like a guardian ad litem is paid. *Redford v. Ramlow*, 27 N.W.2d 754 (Wis. 1947).

service members' rights or to bind them by his/her acts. Paragraph 3-2a(1) of this chapter noted that nothing the guardian ad litem does personally can amount to an appearance on behalf of the service member insofar as the provisions of section 200 are concerned. In the Illinois case of *Rutherford v. Bentz*,<sup>42</sup> the court stated that the acts of the guardian ad litem appointed to represent a defendant who was overseas in military service could not bind the defendant with respect to his right to a continuance.

Of course, once service members begin authorizing acts by their appointed attorneys, they will ordinarily be bound thereby. The Supreme Court of Washington has said:

It appears from the language of the Act that the protection afforded a service member from any waiver of his rights by legal counsel was intended to apply only where attorney acted under authority of the court, rather than authority of the service member.

In each case a question of fact exists; *i.e.*, whether service member has, himself, authorized the attorney to act for him. That the attorney was originally appointed under the act is no wise determinative of this question.<sup>43</sup>

If defendants realize that they are unable to be present for trial and their chances of success are greatly decreased by their absence, they may wish to preserve their right to reopen default judgments under 200(4). In that case, they should not authorize any action by their court-appointed attorneys because the court may construe the action to be an appearance in the proceedings.

### **3-5. Reopening Default Judgments**

Section 200(4)

(50 U.S.C. App. §520)

If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.

*a. Requirements to apply for reopening.* Subsection 200(4) of the Act provides a method whereby a defendant-service member may have a default judgment reopened. In attempting to

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<sup>42</sup>*Rutherford v. Bentz*, 345 Ill. App. 532, 104 N.W.2d 343.

<sup>43</sup>*Sanders v. Sanders*, 63 Wash. 2d 709, 713, 388 P.2d 942, 945 (1964).



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have the judgment reopened, the defendant must apply to the same court that rendered the judgment.<sup>44</sup> Since default judgments obtained in violation of the SSCRA are merely voidable, a judgment remains valid until properly reopened by the service member.<sup>45</sup> Three conditions must exist before a service member can apply to have the court reopen a default judgment reopened.

(1) *Judgment during service or within 30 days thereafter.* Subsection 200(4) refers only to default judgments rendered against the service member during his/her period of service or within thirty days thereafter. This excludes any judgments rendered before the defendant entered military service or more than thirty days after separation from service.

(2) *Application during service or within 90 days thereafter.* The defendant or a legal representative must file an application to reopen not later than 90 days after termination of military service. Defendants discovering default judgments against them more than 90 days after termination of their military service are too late.<sup>46</sup>

(3) *Must have made no appearance.* This subsection, 200(4), refers to default judgments in any action or proceeding governed by section 200. The only judgment governed by section 200 is one in which there is a default of "any appearance" by the defendant. Therefore, to apply to reopen judgments, defendant-service members must not have made any appearance in an action.<sup>47</sup> To preserve their right to apply for a reopening, they should notify plaintiff's attorney of their military

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<sup>44</sup>Davidson v. GFC, 295 F. Supp. 878 (N.D. Ga. 1968). See also Shatswell v. Shatswell, 758 F. Supp. 662 (D. Kan. 1991) (SSCRA does not empower district court to collaterally review, vacate or impede decisions of state court); Scheidigg v. Dept. of Air Force, 715 F. Supp. 11 (D.N.H. 1989), *aff'd*, 915 F.2d 1558 (1st Cir. 1990).

<sup>45</sup> Ostrowski v. Pethick, 590 A.2d 1290 (Pa. Super. Ct. 1991). Dag E. Ytreberg, Annotation, *Construction and Application of § 200 of the Soldier's and Sailors' Civil Relief Act of 1940, as Amended (50 U.S.C.S. Appx. § 520), Relating to Default Judgments Against Members of the Armed Forces*, 35 A.L.R. FED. 649 (1977).

<sup>46</sup>See, e.g., Morris Plan Bank v. Hadsell, 202 Ga. 52, 41 S.E.2d 881 (1947); Radich v. Bloomberg, 140 N.J. 289, 54 A.2d 247, *cert. denied*, 332 U.S. 810 (1947).

<sup>47</sup> In re Marriage of Miller, 858 P.2d 338 (Mont. 1993) (no appearance required to reopen case under SSCRA); Custody of Nugent, 1997 WL 578176, \*4 (Colo. App. 1997) (unpub.); Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750 (Wis. Ct. App. 1989) (legal assistance attorney's letter to the court was "an appearance"); But See Kasubaski v. Kasubaski, 1996 Wis. App. LEXIS 1014 (court suggests Artis-Wergin was wrongly decided); Skates v. Stockton, 140 Ariz. 505, 683 P.2d 304 (Ct. App. 1984) (legal assistance attorney's letter to the court invoking the Soldiers' and Sailors' Civil Relief Act was "an appearance"); See also Hayn, "Soldiers' and Sailors' Civil Relief Act Update," The Army Lawyer, Feb. 1989, at 40; Reinold, "Use of the Soldiers' and Sailors' Civil Relief Act to Ensure Court Participation - Where's the Relief?," The Army Lawyer, June 1986, at 17. *Contra*, Calhoun v. Rookstool, 1995 WL 265047 (Minn. Ct. App. 1995) (unpublished) (request for stay under SSCRA not necessarily "appearance" to waive personal jurisdiction issues).

service so that the proper affidavit is filed, then allow the court appointed attorney to move for a stay. It would be unnecessary to do more. The best policy for military legal assistance attorneys is to have the commander of the service member notify the court of the respondent's military status and/or request for a stay action. Since the commander is not an attorney, his letter will not be construed to be an appearance by counsel.<sup>48</sup> Another successful approach is for the military legal assistance attorney to write the plaintiff's counsel, reminding him of his ethical obligation to present all material facts to the court, including the respondent's military status.<sup>49</sup> Additionally, the Supreme Court of Wisconsin held that the provision of the Soldiers' and Sailors' Civil Relief Act authorizing application within 90 days of termination of service to reopen a judgment is equally available to the soldier represented by a court appointed attorney and to the soldier without court appointed representation.<sup>50</sup>

*b. Criteria for reopening judgment.* Service members must demonstrate that their military service prejudiced their ability to defend their cases and that they have meritorious defenses before they may reopen default judgments under section 200(4).<sup>51</sup> Trial courts have a wide measure of discretion in deciding whether to reopen default judgments.<sup>52</sup>

(1) *Prejudiced by military service.* Defendants must show that at the time of judgment they were prejudiced in their ability to defend the suit because of their service. The courts have ruled that a voidable default judgment is subject to being vacated at the instance of a service member, but only upon proper showing that the service member's defense has been prejudiced by reason of military service.<sup>53</sup> In *Becknell v. D'Angelo*,<sup>54</sup> the court vacated an amended divorce decree of a service member who had left the continental United States before a hearing on his wife's motion to amend, even though he had appeared at the hearing on the initial decree. His military service prejudiced

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<sup>48</sup> *Cromer v. Cromer*, 278 S.E. 2d 518 (N.C. 1981).

<sup>49</sup> *Sacotte v. Ideal-Werk Krug*, 359 N.W.2d 393 (Wis. 1984). See also ABA Rules of Professional Conduct *supra* note 33. Model letters for commanders and to opposing counsel are included with Chapter 8, Appendix A.

<sup>50</sup> *In re Ehlke's Estate*, 250 Wisc. 583, 27 N.W.2d 754.

<sup>51</sup> *Krumme v. Krumme*, 6 Kan. App. 2d 939, 639 P.2d 814 (Kan. Ct. App. 1981); *Paternity of Rogers*, 697 N.E.2d 1193, 1199 (Ill. App. 1998).

<sup>52</sup> *LaMar v. LaMar*, 19 Ariz. App. 128, 505 P.2d 566 (1973). *Becknell v. D'Angelo*, 506 S.W.2d 688 (Tex. Civ. App. 1974).

<sup>53</sup> See, e.g., *Thompson v. Lowman*, 108 Ohio App. 453, 155 N.E.2d 258, *aff'd* 155 N.E.2d 250; *Haller v. Walczak*, 347 Mich. 292, 79 N.W.2d 622 (1956); *Allen v. Allen*, 30 Cal. 2d 433, 182 P.2d 551.

<sup>54</sup> *Becknell v. D'Angelo*, 506 S.W.2d 688 (Tex. Civ. App. 1974); *Matter of Marriage of Thompson*, 832 P.2d 349 (Kans. Ct. App. 1992) (service member prejudiced when default judgment of divorce and child support entered against him while serving overseas and the plaintiff failed to file SSCRA affidavit and the court did not appoint an attorney to protect the service member's interests).

his ability to defend in the action. In *Federal Home Loan Mortgage Corp. v. Taylor*,<sup>55</sup> the court held that the trial court was within its discretion in determining that acceleration of the entire mortgage debt due to default on one month's installment was unconscionable. Misunderstanding and lack of communications were attributable to the mortgagor husband's military service in the Philippines.<sup>56</sup> In *Hawkins v. Hawkins*, a service member showed because he was unable to take leave to defend himself, he was subjected to a court judgment regarding paternity and child support of children that he was not the biological father, and improper division of his military pension, and the court found ample prejudice to the service member.<sup>57</sup>

A New York court, however, refused to set aside a default separation decree against a service member when he was fully advised of pendency of the action, was always accessible to the court, and refused to accept notice by certified mail of the time and place of the trial. The court held that he was not prejudiced by reason of military service in defending the action.<sup>58</sup> A California court ruled that if a service member against whom a default judgment was entered had no desire to assert a defense and had so demonstrated by his prior conduct, his military service did not prejudice him.<sup>59</sup> It may, of course, be quite difficult for defendants to show that their military service prejudiced their ability to defend when they have been in close contact with a court appointed attorney and have cooperated fully in the conduct of the defense. A further discussion of prejudice is provided in Section 3-6, regarding stay actions.

(2) *Meritorious or legal defense.* In addition to showing they were prejudiced in their ability to defend, service members must show that they have a meritorious or legal defense to the original cause of action before a court will reopen a default judgment. For example, one court did not abuse its discretion when it set aside a default judgment when the defendant alleged a meritorious

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<sup>55</sup>*Federal Home Loan Mortgage Corp. v. Taylor*, 318 So. 2d 203 (Fla. App. 1975).

<sup>56</sup>*See Saborit v. Welch*, 108 Ga. 611, 133 S.E.2d 921 (1963) (defendant's absence overseas in military service prima facie shows he was prejudiced in making his defense); *Murdock v. Murdock*, 526 S.E.2d 241, 247 (S.C. 1999) (service member absent overseas notified court of absence from child support hearing by mail and court proceeded to grant judgment against him without inquiry as to why the service member did not appear, and spouse raised issue of debt allotment without first notifying service member, prejudicing service member. The service member had a meritorious defense that he had paid the required child support). *But see* . *LaMar v. LaMar*, 19 Ariz. App. 128, 505 P.2d 566 (no abuse of discretion to refuse to vacate default divorce judgment obtained against service member stationed abroad, where he was fully informed of action, took no steps to protect any rights he might have cared to assert, and made no attempt to stay proceedings); *United Ohio Insurance Co., v. Rivera*, 1998 WL 965989, (Ohio App. 1998) (unpub) (Service member stationed abroad failed to provide affidavit or other evidence of prejudice or meritorious defense to reopen default judgment).

<sup>57</sup> *Hawkins v. Hawkins*, 999 S.W.2d 171, 175-176 (Tex. App. 1999).

<sup>58</sup> *Burgess v. Burgess*, 234 N.Y.S.2d 87 (1962).

<sup>59</sup> *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).

defense.<sup>60</sup> Similarly, in the case of *Flagg v. Sun Investment & Loan Corp.*,<sup>61</sup> the petitioner was prevented from defending an action on a note as well as the foreclosure of his mortgage because of his military service. Petitioner's funds were on deposit with the military and were not available to him until his permanent change of station or discharge. He was therefore unable to pay the creditor the amount due. This situation was sufficient to constitute prejudice by reason of military service. The petitioner was entitled to have the foreclosure sale and confirmation reopened so he could defend the case. In contrast, when a wife obtained a decree in equity declaring a divorce obtained by husband after entry into armed forces void because of fraud, the husband could not reopen the case. His petition did not show a meritorious or legal defense to the original suit.<sup>62</sup>

The requirement that petitioners have a meritorious defense is a useful provision. It avoids a waste of effort and resources in reopening judgments in cases in which service members have no defense.

When a default judgment is based on an affidavit that falsely states that defendant is not in military service, the service member has the right to have the judgment set aside without establishing a meritorious defense.<sup>63</sup> To ultimately succeed on the merits, however, the service member must still have a meritorious defense.

*c. Rights of a bona fide purchaser.* When a default judgment is vacated, set aside or reversed under this section, title to property held by a bona fide purchaser could theoretically be in jeopardy. Subsection 200(4) protects the bona fide purchaser, however, by stating that vacating, setting aside, or reversing any judgment under the Act shall not impair any right or title acquired by any bona fide purchaser for value under the judgment.

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<sup>60</sup>Gray v. Dillon, 97 Ariz. 16, 396 P.2d 251 (1964). *See also* Urbana College v. Conway, 29 Ohio App. 3d 13, 502 N.E.2d 675 (Ct. App. 1985) (an independent counterclaim arising from the same transaction, although valid, is not a meritorious defense); LaMar v. LaMar, 505 P.2d 566 (Ariz. App. 1973)(motion to vacate must not only declare that movant has a good and meritorious defense to the action but must also set out what is the defense).

<sup>61</sup>Flagg v. Sun Inv. & Loan Corp., 373 P.2d 226 (1962).

<sup>62</sup>Martin v. Martin, 200 Tenn. 191, 292 S.W.2d 9 (1956).

<sup>63</sup>Kirby v. Holman, 238 Iowa 355, 25 N.W.2d 664 (1947).

**3-6. Stay of Proceedings Where Military Service Affects Conduct Thereof**

Section 201

(50 U.S.C. App. § 521)

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

*a. The nature of section 201 "stay."* A "stay" under section 201 differs from those granted under section 301, 302, and 700. It is distinguishable on two principal grounds. First, the latter three stay provisions involve pre-service obligations while section 201 applies to both pre-service and in-service obligations.

Second, in applying sections 301, 302, and 700 "the court makes substantive determinations about the nature of the obligation (*i.e.*, whether it falls within one of these sections) and the service member's ability to meet the obligation (*i.e.*, the presence or absence of material effect). If the court finds that the service member's ability to comply with the terms of his obligation is materially affected by military service, the court may order a stay."<sup>64</sup> On the other hand,

In deciding whether to grant a stay under [section 201], a court does not look to the nature of the obligation at all. What the court does examine is whether the ability of the service member to participate in a judicial action has been materially affected by military service.<sup>65</sup>

(1) *Who may apply.* A proper person to seek a stay is a person in the military service, as defined in section 101 of the Act and, more specifically, one who is involved in the

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<sup>64</sup>Bagley, *The Soldiers' and Sailors' Civil Relief Act-A Survey*, 45 MIL. L. REV. 1, 12 (1969).

<sup>65</sup>*Id.*

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proceedings as either a plaintiff or defendant.<sup>66</sup> The stay does not apply to tort claims by military dependents.<sup>67</sup>

Arguably, when a service member is involved in a proceeding, but is neither the plaintiff nor the defendant, the service member is not entitled to a "stay" under this section. The statutory language has not, however, been interpreted by the courts in such a restricted manner. Rather, at least one court has held that "one who is a proper, as distinguished from an indispensable, party to a proceeding, and whose rights or interests may be affected by its determination is entitled to the benefit of the Act."<sup>68</sup>

If the service member is neither the plaintiff nor the defendant, does this mean that his associates, persons not in the military, can seek the protection of the Act? The answer to the question depends to a large part on the legal relationship of the service member not only to the issue in controversy, but also to the parties involved. One court has held that co-makers of a note are entitled to a stay based on the military service of one of the co-makers.<sup>69</sup> Other courts have reached the opposite conclusion, however, in the following situations: when defendant's counsel was unavailable because of military service;<sup>70</sup> when witnesses were unavailable because of military service;<sup>71</sup> and in the case of an auto accident, when the plaintiff was imputed with the negligence of a learners permittee who was presently unavailable because of military service.<sup>72</sup>

(2) *When and where application may be made.* The statute specifies that in "any action or proceeding... during the period of service or within sixty days thereafter," the service member may seek a stay. Compliance with applicable court rules prescribing time of filing and requisites for a motion for continuance is not necessary in the application for SSCRA stay relief. While application for a stay may be made at any stage of the proceedings, those aspects of civil court proceedings that may

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<sup>66</sup>See *Mays v. Tharpe and Brooks, Inc.*, 143 Ga. App. 815, 240 S.E.2d 159 (1977) (a person in the military is entitled as a matter of law to a stay of proceedings against him upon his bare application stating that he is at the time actively in military service).

<sup>67</sup> *Jusino v. New York City Housing Authority*, 255 A.D.2d 41, 45; 691 N.Y.S.2d 12; 1999 N.Y. App. Div. LEXIS 4346 (1999); and *Peace v. Bruce*, 1988 U.S. Dist. LEXIS 6278 (S.D. Ga. June 15, 1988).

<sup>68</sup>See also *McCoy v. McSorley*, 119 Ga. App. 603, 168 S.E.2d 202 (1969) (stays in judicial proceedings where persons in military service are involved should be liberally construed in favor of service member).

<sup>69</sup>*Hempstead Bank v. Gould*, 54 Misc. 2d 410, 282 N.Y.S.2d 602 (1967).

<sup>70</sup> *Salazar v. Rahman*, 1993 WL 22085 (Tex. Ct. App. 1993) (§ 521 applies only to parties in a civil proceeding and does not provide for a stay based on an attorney's military service). See also *Grimes v. State of Oklahoma*, 377 P.2d 847 (1963).

<sup>71</sup>*Ohio v. Gall*, 1992 WL 217999 (Ohio App. 1992) ("party" does not include a material witness). See also *Moulder v. State*, 118 Ga. App. 87, 162 S.E.2d 785 (1968).

<sup>72</sup>*Forker v. Pomponio*, 60 N.J. Super. 278, 158 A.2d 849 (1960).

be easily handled without the physical presence of a respondent or plaintiff, will most likely not be approved for a Section 201 stay, e.g., discovery. In *Massey v. Kim*,<sup>73</sup> a military respondent requested a stay of a civil lawsuit discovery process until he returned from his three-year overseas tour. The court rejected the stay request, pointing out that improvements in modern communications since the passage of the SSCRA made such a stay unnecessary. The impact of the Internet, video conferencing, and video depositions<sup>74</sup> on court determinations as to the unavailability of service members for civil case discovery has yet to be fully realized. Video teleconferencing or Internet contact, however, should not substitute for service members' physical presence at their trial on the merits.<sup>75</sup> "The opponent of the absent party will always have the edge [at trial]."<sup>76</sup>

Section 201 applies to courts not of record as well as courts of record, but is inapplicable in administrative or departmental hearings or proceedings. Bankruptcy debtor/creditor meetings and relief from automatic stay hearings are considered civil court proceedings covered by the SSCRA.<sup>77</sup> Many states have set up administrative proceedings to expedite handling of child support and paternity support claims; these state administrative proceedings are not covered by Section 201, SSCRA.<sup>78</sup>

*b. Court powers to stay.* A court must act on a stay either when a defendant applies to the court or when the proceedings themselves put the court on notice that a service member's rights are affected. Once the court has notice, regardless of how notice was given, it must determine whether "the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." The test is therefore one of *material effect*. If a court finds

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<sup>73</sup> *Massey v. Kim*, 455 S.E.2d 306 (Ga. Ct. App. 1995).

<sup>74</sup> *Keefe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981) (court denied stay request to delay deposition, and suggested that service member agree to videotape deposition in accordance with Federal Rules of Civil Procedure Rule 30(b)(4)); *see also* *In re Diaz*, 82 B.R. 162, 165 (Bankr. D. Ga. 1988) (service members in Germany may make video depositions for use in trials in the United States, so Section 201 stay is not appropriate to delay discovery).

<sup>75</sup> Roger M. Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act*, 32 SANTA CLARA L. REV. 137, 162 (1992).

<sup>76</sup> *Id.* at 165. *See also* Major Howard McGillin, Note, *Stays of Judicial Proceedings*, The Army Lawyer, July 1995, at 68, 69-70.

<sup>77</sup> *In re Ladner*, 156 B.R. 664 (Bankr. D. Col. 1993); *In re Burrell*, 230 B.R. 309 (Bankr. E.D. Tex. 1999). (SSCRA applies to automatic stay relief hearings under Chapter 13 bankruptcy proceedings) *See also* William L. Medford, *The Soldiers' and Sailors' Civil Relief Act-Are You Stayed From Obtaining Relief From the Automatic Stay*, 18-MAR Am. Bankr. Inst. J. 23 (1999).

<sup>78</sup> *See* Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325, 363, 110 Stat. 2105 (1996), which require the states to set up administrative proceedings to expedite handling of child support and paternity support claims. Congress failed to include SSCRA stay provisions for hearings based upon such administrative proceedings, despite the specific request of the Department of Defense.

material effect (and that the service member is unavailable to defend), the court must order a stay. If the stay request is denied, the court must make findings of fact about the lack of material effect, or ensure that there is sufficient evidence in the record to warrant denial.<sup>79</sup>

(1) *Granting the stay.* Courts have expressed a wide variety of opinions on what they will consider in determining whether to grant a stay. As a matter of policy, it is immaterial that a delay or inconvenience may result from a stay. A stay is a proper imposition upon an individual citizen on behalf of those discharging their obligations to the common defense.<sup>80</sup> On the other hand, the section cannot be used by a party to shield wrongdoing or lack of diligence,<sup>81</sup> or be used as an instrument by which one in the military service may endanger the peace, health, and lives of people by staying proceedings intended to protect the general public.<sup>82</sup> A good way to analyze cases for Section 201 stay is to ask the following questions: (1) Is the service member unavailable to appear? [Has he attempted to take leave and was it denied?]; (2) What is the actual prejudice (adverse material affect) to the service member if he does not appear at the civil court proceeding? If the facts of the case are uncontested, the service member is not a real party in interest, or the service member has previously acted in bad faith in dealing with the court, the chances of the court granting a Section 201 stay are minimal.

In *Boone v. Lightner*,<sup>83</sup> the Supreme Court addressed the issue of whether the Act mandates grant of a stay in all cases. The Court held that a trial court must grant a stay only when material effect is present. A more recent state court opinion, however, seems to place this burden on the nonmilitary party in all instances. The court held that a person in the military service is entitled as a matter of law to a stay of any proceeding by or against him, upon a showing that he is in the military service, unless further relevant evidence demonstrates that his ability to prosecute or defend is not materially impaired by his military service.<sup>84</sup> This is clearly the minority view.<sup>85</sup> In almost every case, the service member

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<sup>79</sup> Olsen v. Olsen, 621 N.E. 2d 830 (Ohio 1993).

<sup>80</sup> Semler v. Oertwig, 234 Iowa 233, 12 N.W.2d 265 (1943).

<sup>81</sup> See Booker v. Everhart, 33 N.C. App. 1, 234, S.E.2d 46 (1977) *rev'd* 294 N.C. 146, 240 S.E.2d 360 (1978); Runge v. Fleming, 181 F. Supp. 224 (N.D. Iowa 1960); In re Burrell, 230 B.R. 309, \*313 (E.D. Tex. Br. 1999); Hibbard v. Hibbard, 431 N.W.2d. 637 (Neb. 1988) (service member who refuses to obey court visitation orders and is in contempt of court is not entitled to a stay in change of custody action); Riley v. White, 563 So.2d 1039 (Ala. Civ. App. 1990) (soldier's failure to voluntarily submit to paternity test before going overseas, after having been granted a previous continuance by court to get tested, denied stay); and Judkins v. Judkins, 441 S.E.2d 139 (N.C. 1994) (soldier who receives several continuances and stays because of military duty in Persian Gulf conflict, and upon return refuses to comply with court discovery orders, denied stay).

<sup>82</sup> City of Cedartown v. Pickett, 194 Ga. 508, 22 S.E.2d 318 (1942).

<sup>83</sup> Boone v. Lightner, 319 U.S. 561, *reh'g denied*, 320 U.S. 809 (1943).

<sup>84</sup> Mays v. Tharpe and Brooks, Inc., 143 Ga. App. 815, 240 S.E.2d 159; *see also* Boothe v. Henrietta Eggleston Hosp. for Children, 168 Ga. App. 352, 308 S.E.2d 844 (Ct. App. 1984).

<sup>85</sup> Baron, *supra* note 72, at 143-149.



must show more than his military status to be granted a Section 201 stay. In most instances, the prerequisite to obtaining a stay is a showing that he is unavailable to appear at the civil court hearing.<sup>86</sup> Failure by the service member to demonstrate that he requested leave and was turned down, or that he had no leave available is usually fatal to a Section 201 stay request.<sup>87</sup> In most cases, the military legal assistance practitioner should assume that the burden is on the service member seeking the stay to show that they were unable to take leave to appear.<sup>88</sup>

The Welfare Reform Act of 1996 further complicates the argument of a service member that they cannot take leave. One provision of the Act directs the military services to promulgate regulations to facilitate the granting of leave for service members to appear in court paternity and child support hearings.<sup>89</sup> Department of Defense Directive 1327.5, "Leave and Liberty," dated 24 September 1985, was amended on 10 September 1997, to implement this change by adding subsection F.25.<sup>90</sup> The new subsection reads as follows:

F.2.5. When a Service member requires leave on the basis of need to attend hearings to determine paternity or to determine an obligation to provide child support, leave shall be granted, unless a. the member is serving in or with a unit deployed in a contingency operation or b. exigencies of military service require a denial of such request. The leave shall be charged as ordinary leave.<sup>91</sup>

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<sup>86</sup> Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981); Cromer v. Cromer, 278 S.E.2d 518 (N.C. 1981) (service members unable to take leave for a limited period because of military sea duty).

<sup>87</sup> Hibbard v. Hibbard, 431 N.W.2d 637 (Neb. 1988) (court affirms adverse judgment against overseas soldier where soldier failed to use 38 day leave stateside to resolve pending support modification motion); Underhill v. Barnes, 288 S.E.2d 905 (1982) (when soldier made no showing of attempt to request leave, court took judicial notice of military leave regulations and assumed soldier had 50 days of leave accrued based upon length of service); and Palo v. Palo, 299 N.W.2d 577 (S.D. 1980) (no stay granted for husband in divorce matter where both husband and wife were service members, and wife obtained leave to appear but husband did not). *See also* Carrasquillo v. City of New York, 653 N.Y.S. 2d 698, (N.Y. App. Div. 1997); Bowman v. May, 678 So.2d 1135 (Ala. Civ. App. 1996) and Judkins v. Judkins, 441 S.E.2d 139 (N.C. 1994) (service member must make an actual showing of unavailability, including an effort to obtain leave or stay request will be denied).

<sup>88</sup> Baron, *supra* note 72, at 18.

<sup>89</sup> The Welfare Reform Act of 1996, Pub. L. No. 104-193, § 363(b), 110 Stat. 2248 (codified as 10 U.S.C.S. § 704 (1997) (Facilitating Granting of Leave for Attendance at Hearings).

<sup>90</sup> Change 4, U.S. DEP'T OF DEFENSE, DIR. 1327.5, LEAVE AND LIBERTY (10 SEP. 1997), TO U.S. DEP'T OF DEFENSE, DIR. 1327.5, LEAVE AND LIBERTY (24 Sep. 1985) [hereinafter DOD DIR. 1327.5].

<sup>91</sup> *Id.*

In some cases, the service member may not apply for a stay, but the court becomes aware of the fact that one of the parties is in the military service. The statute authorizes the trial court to grant a stay sua sponte in these cases.<sup>92</sup> The court must use the same decision-making process it uses in evaluating requested stays; the court must determine whether the service member's military service materially affected the ability to appear. If the court determines that material effect does exist, it should grant the stay. Failure to grant a stay sua sponte in such circumstances would violate the intent of the Act, as expressed in section 100, and the equitable philosophy behind it. Such a failure would probably be reversed on appeal as an abuse of judicial discretion.<sup>93</sup> It could also serve as a sound equitable basis for attacking a default judgment under section 200(4).

In exercising discretion, a number of courts have established guidelines to assist them. First, since this section of the Act is discretionary, it is not an absolute bar to proceedings against someone in the military service. Therefore, service members are not entitled to stays of proceedings in all instances.<sup>94</sup> In deciding whether to grant a stay, a court must consider all the facts and circumstances in each case.<sup>95</sup> Second, the power to stay under all the facts and circumstances does not imply a power to stay in anticipation that at some future time, as the litigation progresses, the ability of the service member to prosecute or defend will be materially affected by reason of military service.<sup>96</sup> Last, an appellate court will reverse a trial court only when it has abused its exercise of discretion.<sup>97</sup> In 1992, the

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<sup>92</sup> *White v. Black*, 190 F.3d 366, 368 (5<sup>th</sup> Cir. 1999).

<sup>93</sup> *Coburn v. Coburn*, 412 So.2d 947 (Fla. Ct. App. 1982) (trial court abused its discretion in refusing to postpone proceedings concerning child custody, alimony, attorneys fees, and costs until husband's military service could not hamper his ability to defend the action).

<sup>94</sup> *Fourth Nat'l Bank in Wichita v. Hill*, 181 Kan. 685, 314 P.2d 312 (1957); *see also* *Rogers v. Tangipahoa Parish Sheriff's Office*, 1997 WL 466922 (E.D. La. 1997); *Carrasquillo v. City of New York*, 653 N.Y.S.2d 698 (N.Y. App. Div. 1997); *Power v. Power*, 720 S.W.2d 683 (Tex. Ct. App. 1986) (bare statement requester was in military was insufficient to establish material effect); *Courtney v. Sosbe*, 670 N.E.2d 1092 (Toledo [Oh] Mun. Ct. 1996) (service member who consulted JAG officer regarding traffic ordinance case who told him that "they would take care of it", but who made no effort to arrange leave was not granted a stay or allowed to reopen a default judgment.); and *supra* note 84.

<sup>95</sup> *See* *Graves v. Bedner*, 167 Neb. 847, 95 N.W.2d 123 (1959); *Tabor v. Miller*, 389 F.2d 645 (3rd Cir. 1968).

<sup>96</sup> *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952).

<sup>97</sup> *McCoy v. McSorley*, 119 Ga. App. 603, 168 S.E.2d 202; *see also* *Riley v. White*, 563 So.2d 1039 (Ala. Civ. App. 1990) (trial court did not abuse discretion in refusing putative father's request for stay, after father left with military unit for overseas duty without submitting to required blood test. Father was aware of proceedings, was represented by attorney, received previous delay and left for Germany without informing court); *Williams v. Williams*, 552 So.2d 531 (La. Ct. App. 1989) (facts of each case determine whether trial court abused discretion in refusing stay request); *Jackson v. Jackson*, 403 N.W.2d 248 (Minn. Ct. App. 1987); *Nurse v. Portis*, 520 N.E.2d 1372 (Ohio Ct. App. 1987); *Moulder v. Steele*, 118 Ga. App. 87, 162 S.E.2d 785 (1968) (grant or denial of stay is final judgment on collateral matter of stay and is appealable).

Tennessee Court of Appeals granted an extraordinary appeal and reversed a trial court's dissolution of a stay previously granted under the SSCRA, stating that there was no evidence in the record to show that military service did not materially effect the defendant's ability to be present.<sup>98</sup> Another factor may be if the other party to the lawsuit is unable to be located (child custody dispute), the court may find it is not necessary for the military member to appear.<sup>99</sup> Where a service member is materially affected by military service from defending a lawsuit, a court may not consider dismissal of the suit without prejudice as an alternative remedy.<sup>100</sup>

Even if the service member can not appear because of military service, courts might consider the presence of the service member unnecessary to the proceeding; and refuse to grant a stay. Generally, no prejudice will be found if the service member is represented at the court proceeding by civilian counsel, although the service member may not personally attend.<sup>101</sup> Common situations where stays are denied are cases where there are no contested facts. Good examples of such uncontested fact cases are an uncontested divorce, or divorce based upon a joint stipulation or separation agreement,<sup>102</sup> a child support determination hearing based upon an income formula where the service member is not contesting the income figures,<sup>103</sup> or a Revised Uniform Reciprocal Enforcement of Support Act (RURESA) case.<sup>104</sup> Generally, courts will not grant a stay for an appellate oral argument by service member's counsel, since the service member is not essential to the proceeding.<sup>105</sup> The Mississippi Supreme Court found a military father not a necessary party in a proceeding by the mother challenging custody of his children by their paternal grandmother.<sup>106</sup> The Georgia Supreme Court has said that as

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<sup>98</sup>Conley v. Briley, 1992 WL 56995 (Ten. App. 1992).

<sup>99</sup> Sbarge v. Sbarge, 694 N.Y.S.2d 723; 1999 N.Y. App. Div. LEXIS 8902 (1999) (service member, the custodial parent, on Zuni Reservation as PHS doctor, and spouse's whereabouts unknown should not require SM to attend hearing requested by New York Family Court to review custody order; stay granted).

<sup>100</sup> White v. Black, 190 F.3d 366 (5<sup>th</sup> Cir. 1999).

<sup>101</sup> In re Marriage of Peck, 920 P.2d 236 (Wash. App. 1996); In re Custody of Nugent, 1997 Colo. App. LEXIS 206 (Colo. App. 1997).

<sup>102</sup> Palo v. Palo, 299 N.W.2d 577 (S.D. 1980).

<sup>103</sup> Jaramillo v. Sandoval, 431 P.2d 65 (N.M. 1967); Ford v. Ford, 1996 WL 685787 (Oh. App. 1996) (unpub.). See also 42 U.S.C. ?? 651-667 (1990); and Peter Cushing, *The Ten Commandments of Military Divorce: Representing the Nonmilitary Spouse, Part 1*, 69 FLA. B.J. 66, 67 (Aug. 1995).

<sup>104</sup> State ex. rel. Adams v. Adams, 455 N.W.2d 227, 230 n.2 (S.D. 1990); but see Schmidt v. Schmidt, 444 N.W.2d 367, 372-73 (S.D. 1989).

<sup>105</sup> Kesler v. Kesler, 682 S.W.2d 44, 45 n.1 (Mo. Ct. App. 1984).

<sup>106</sup>Bubac v. Boston, 600 So.2d 951 (Miss. 1992).

general rule, temporary modifications of child support do not materially affect the rights of a military defendant as they are interlocutory and subject to modification.<sup>107</sup> Another category of cases where courts will find the presence of a service member unnecessary are personal injury claims where the service member defendant is insured, and the plaintiff is not suing the defendant beyond the plaintiff's insurance policy limits. In these cases the real party in interest is the service member's insurance company.<sup>108</sup>

(2) *Who has the burden of proof to show "material effect."* In discussing the question of burden of proof, the Supreme Court concluded that:

The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come.<sup>109</sup>

In response to this language, the trial courts have varied from case to case and jurisdiction to jurisdiction in allocating the burden of showing material effect.<sup>110</sup> As a practical matter, however, the person in the

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<sup>107</sup>Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989).

<sup>108</sup>Boone v. Lightner, 319 U.S. 561, 569 (1943); Underhill v. Barnes, 288 S.E.2d 905, 907 (Ga. Ct. App. 1982); and Hackman v. Postel, 675 F. Supp. 1132 (N.D. Ill. 1988). *See also* Murphy v. Wheatley, 360 F.2d 180 (5th Cir. 1966) (subrogation claims where real parties in interest are the insurance companies of the parties).

<sup>109</sup>Boone v. Lightner, 319 U.S. 561, 569 (1943).

<sup>110</sup>*See, e.g.*, Coburn v. Coburn, 412 So. 2d 947 (Fla. Ct. App. 1982 (burden is on party who opposes stay of military service); Bond v. Bond, 547 S.W.2d 43 (Tex. Civ. App. 1976) (trial court has wide discretion in deciding which party should carry the burden of proof on the issue of prejudice); Mayfield Sales Inc. v. Sams, 169 So. 2d 150 (La. App. 1964) (burden on defendant in military service); Holzman's Furniture Store v. Schrapf, 39 So. 2d 450 (La. App. 1949) (does not impose burden on party resisting application for stay to satisfy trial court by clear and convincing evidence that service member's rights are not impaired); Gates v. Gates, 197 Ga. 11, 25 S.E.2d 108 (1943) (may obtain evidence from either party); Bowsman v. Peterson, 45 F. Supp. 741 (1942) (burden on plaintiff resisting application for stay). *See also* Baron, *supra* note 72 at 143-149; and Mary Kathleen Day, Comment, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act*, 27 TULSA L.J. 45 (Fall 1991).

military service should always present evidence that demonstrates that military service has materially affected his ability to prosecute or defend the action.<sup>111</sup>

*c. Minimum evidentiary requirements.* No uniform standards prescribe the quantity or quality of evidence necessary to support a stay. Each case requires an individual determination based on the evidence. Similar to the burden of proof issues, the requisites vary from jurisdiction to jurisdiction, often based largely on the visceral reaction of the court to the case and on the judicial philosophy of the individual on the bench.

Nevertheless, one obvious requirement exists in all section 201 cases. The moving party must be a "person in the military service" within the ambit of section 101. In a small minority of jurisdictions such a showing has been a sufficient basis for a stay.<sup>112</sup> The vast majority of jurisdictions follow *Boone v. Lightner*,<sup>113</sup> however, and require something more of the service member.

One of the most important factors is often unavailability--that is, the service member's ability to attend the court proceedings. If the unavailability is temporary and will end at a fixed date in the relatively near future, the courts will almost always grant a stay. Military practitioners should avoid seeking stays that are unreasonably long in duration, since most courts understand that military members are usually eligible for leave, even if they are stationed overseas.<sup>114</sup> Courts more carefully scrutinize protracted unavailability, particularly when it results from an overseas assignment. In these cases, the

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<sup>111</sup>*See, e.g.,* Hackman v. Postel, 675 F. Supp. 1132 (N.D. Ill. 1988) (to invoke stay provision, service member must show actual unavailability and an adverse effect created by his absence); Roberts v. Fuhr, 523 So.2d 20 (Miss. 1987), Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 251 (Mo. App. 1999) (service member invoking statutory stay provision has burden of showing defense will be materially affected by his military service); Palo v. Palo, 299 N.W.2d 577 (D. S.D. 1980) (stay not granted to a service member who failed to demonstrate an attempt to take leave, actual unavailability, and adverse effects from absence at trial). *Contra* Coburn v. Coburn, 412 So.2d 947 (Fla. App. Ct. 1982) (burden of persuasion in issue of material effect is on party opposing service member's request for a stay).

<sup>112</sup>*Mays v. Tharpe and Brooks*, 143 Ga. App. 815, 240 S.E.2d 159. *But see* *Norris v. Superior Court of Mohave County*, 14 Ariz. App. 183, 481 P.2d 553 (1971) (denial of continuance was not an abuse of discretion where plaintiff was in military service and stationed in Germany, where his affidavit did not state that he would be unavailable for trial, that he had requested leave, that it was not possible to obtain leave or that his rights would be impaired if matter would be tried in his absence); *Robin Farms, Inc. v. Bartholome*, 989 S.W.2d 238, 251-252 (Mo. App. 1999) (reservist respondent claims military active duty every time his contract breach case comes to trial, so court refuses to grant stay solely on basis of respondent's affidavit and military order); *Roark v. Roark*, 201 S.W.2d 862 (Tex. Civ. App. 1947).

<sup>113</sup>*Boone v. Lightner*, 319 U.S. 561 (1943).

<sup>114</sup>*See* *Keefe v. Spangenberg*, 553 F. Supp. 49, 50 (W.D. Okla. 1981) (court denies service member stationed overseas request for a three year stay until his expected date of discharge as being unreasonable).

### Chapter 3 - General Relief - Interest Rates, Judicial Proceedings

courts usually require service members to make some effort to delay their departure or to secure leave to return from their overseas stations. A majority of courts require service members stationed in the continental United States to attempt to obtain leave.<sup>115</sup>

Courts also usually require service members to be diligent in their attempts to appear.<sup>116</sup> A service member may satisfy the requirement by showing that the command denied an effort to obtain leave. In other cases, service members may demonstrate diligent efforts to participate in the proceedings and to complete them before an anticipated unavailability begins.<sup>117</sup> In all instances, service members must act in good faith in their otherwise diligent efforts to protect their rights.<sup>118</sup>

The central issue in these evidentiary requirements is whether the case requires the service member's presence at trial. The trial courts often give substantial weight to the nature of the action and the relationship of the service member to the action. The service member's ignorance of the facts in a dispute may militate against a stay. On the other hand, a court may consider the availability of the service member either personally or by deposition during the pre-trial period to be the determining factor in denying a stay. Finally, where the service member has hired counsel to represent him, but goes overseas on military duty during a case, military service is not itself, without more, a basis for a stay, especially when the service member failed to pay child support during his overseas duty period.<sup>119</sup>

In some situations, courts have consistently denied stays.<sup>120</sup> Denial of stays in appeals involving purely legal issues reflects courts' concern with the need for a service member's presence.<sup>121</sup> Courts have also consistently denied stays when granting them would be contrary to public policy. Abatement

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<sup>115</sup>See, e.g., *Hackman v. Postel*, 675 F. Supp. 1132 (N.D. Ill. 1988); *Palo v. Palo*, 299 N.W.2d 577 (D. S.D. 1980); *Graves v. Bedner*, 167 Neb. 847, 95 N.W.2d 123; and *supra* notes 84-89, 105-107 and accompanying text.

<sup>116</sup>*Id.*; *Palo v. Palo*, 299 N.W.2d 577 (court noted that service member had not attempted to take leave and had not demonstrated his unavailability).

<sup>117</sup>*Christine M. v Superior Court*, 69 Cal. App. 4<sup>th</sup> 1233, 82 Cal. Rptr. 2d 220 (1999) (sailor failed to participate in prior hearings for child's termination of parental rights, failed to meet with his court appointed attorney, and failed to attend court ordered parenting class, and conceded that he could not raise the child alone, therefore the court found that he needed to show more than his military status to be entitled to a stay of final placement hearing).

<sup>118</sup>See *Zitomer v. Holdsworth*, 409 F.2d 724 (3rd Cir. 1971); *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977), *rev'd* 294 N.C. 146, 240 S.E.2d 360.

<sup>119</sup>*Crowley v. Crowley*, 708 N.E.2d 42, 50 (Ind. 1999).

<sup>120</sup>*Olsen v Olsen*, 87 Ohio App. 3d 12 (1993) (denial of stay request improper without findings of fact or sufficient evidence in the record to support denial).

<sup>121</sup>*Cornelius v. Jackson*, 201 Okla. 667, 209 P.2d 166 (1948); *Rosier v. McDaniel*, 129 W. Va. 401, 40 S.E.2d 832 (1946). See also *supra* note 100 and accompanying text.

of a public nuisance is an example that illustrates this policy.<sup>122</sup> Many courts dealing with paternity,<sup>123</sup> custody, and support,<sup>124</sup> personal injury lawsuits where the claims exceed insurance policy limits or there is no insurance,<sup>125</sup> and personal liability in financial debt lawsuits,<sup>126</sup> however, have favored granting stays.<sup>127</sup>

### **3-7. Fines and Penalties on Contracts**

#### **Section 202**

(50 U.S.C. App. § 522)

When an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired.

Section 202 of the Act deals with two types of situations. First, when compliance with the terms of a contract is stayed pursuant to the Act, no fine or penalty shall accrue by reason of failure to comply during the period of the stay. Second, when no stay exists and a fine or penalty is imposed for nonperformance, the court can relieve enforcement if the person was in the military service when the penalty was incurred and his ability to pay or perform was materially impaired.

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<sup>122</sup>State *ex rel.* Swanson v. Heaton, 237 Iowa 564, 22 N.W.2d 815 (1946); City of Cedartown v. Pickett, 194 Ga. 508, 22 S.E.2d 318 (1942).

<sup>123</sup>Mathis v. Mathis, 236 So. 2d 775 (Miss. 1970) (paternity suit is of such personal and intimate nature that absence materially affects defense unless a specific finding is made to the contrary).

<sup>124</sup>Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (change of custody action where service member was unavailable and was denied SSCRA stay reversed); Derby v. Kim, 238 Ga. 429, 233 S.E.2d 156 (1977); and Smith v. Smith, 149 S.E.2d 468, 471 (Ga. 1966) (alimony dispute).

<sup>125</sup>Starling v. Harris, 151 S.E.2d 163 (Ga. Ct. App. 1966).

<sup>126</sup>Mays v. Tharpe & Brooks, Inc., 240 S.E.2d 159 (Ga. Ct. App. 1977).

<sup>127</sup>*But see* Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989) (temporary modifications of child support do not materially affect the rights of a military defendant as they are interlocutory and subject to modification).

This section can be applicable to late charges on an installment contract, early termination penalties for an automobile lease with an option to purchase clause, or to a delinquency fine on a promissory note. In these cases, the court must conclude that the maker's military service impaired the ability to pay.

**3-8. Exercise of Rights Under Act Not to Affect Certain Future Financial Transactions**

Section 108

(50 U.S.C. App. § 518)

Application by a person in military service for, or receipt by a person in military service of, a stay, postponement, or suspension pursuant to the provisions of this Act in the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability of that person shall not itself (without regard to other considerations) provide the basis for any of the following:

- (1) A determination by any lender or other person that such person in military service is unable to pay such civil obligation or liability in accordance with its terms.
- (2) With respect to a credit transaction between a creditor and such person in military service--
  - (A) a denial or revocation of credit by the creditor;
  - (B) a change by the creditor in the terms of an existing credit arrangement; or
  - (C) a refusal by the creditor to grant credit to such person in substantially the amount or on substantially the terms requested.
- (3) An adverse report relating to the creditworthiness of such person in military service by or to any person or entity engaged in the practice of assembling or evaluating consumer credit information.
- (4) A refusal by an insurer to insure such person.

This section was added by the 1991 Amendments. Of course, creditors may take adverse action against service members who fail to comply with obligations after they are adjusted by reason of the Act. For example, a service member who fails to pay monthly installments on an obligation reduced to 6% pursuant to 50 U.S.C. App. § 526 could be subject to an adverse credit report.

What may a service member do if he wrongly receives an adverse credit report because he asserted the SSCRA stay or 6% interest cap provisions? Enforcement is through the Fair Credit



Reporting Act (FCRA) provisions for "adverse actions"<sup>128</sup>, handling disputed information involving "adverse actions",<sup>129</sup> and consumer remedies for "willful or negligent noncompliance by credit reporting agencies upon consumer showing of causal connection between inaccurate credit report and denial of credit or other consumer benefit."<sup>130</sup> A service member who is refused further credit by the lending institution, or has his credit limit downgraded because of asserting the SSCRA 6% interest cap on a loan, may also seek relief under this section. A failure of a lender to forgive interest above 6% may be the basis for a private cause of action against the lender, pursuant to Section 518 (2)(B).<sup>131</sup>

### **3-9. Stay or Vacation of Execution of Judgments, Attachments**

#### **Section 203**

(50 U.S.C. App. § 523)

In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service--

(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; and

(b) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment as provided in this Act.

This is another "stay" section of the Act. It differs from other stay provisions because it is not a stay of proceedings, but authorizes a court to stay execution of a judgment or order entered against a service member. It also authorizes a court to vacate or stay an attachment or garnishment on a service member's property. The same basic rules for granting stays under section 201 apply. These rules

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<sup>128</sup> Fair Credit Reporting Act, §603, 15 U.S.C. §1681 (1994), *as amended by* Consumer Credit Reporting Reform Act of 1996, §§ 2401-2452, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (effective Sep. 30, 1997) (to be codified as amended at 15 U.S.C. § 1681). *See also* Major James Pottorff, Note, *The Soldiers' and Sailors' Civil Relief Act Amendments of 1991*, The Army Lawyer, May 1991, at 46, 47-48.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Moll v. Ford Consumer Finance Company, Inc.*, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998) (unpub.). *Accord*, *Marin v. Citibank, N.A.*, 208 F.3d 203 (2d Cir. 2000).

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require good faith on the part of service members. Their military service also must materially affect their ability to comply with the judgment or decree entered against them. The suit giving rise to the judgment may have commenced prior to, during, or within 60 days after military service. Additionally, "as in the case of sections 201, 301, and 302 the court is empowered to order a stay on its own motion if it finds material effect and must grant the stay on the service member's motion unless it finds an absence of material effect."<sup>132</sup>

This section does not apply to actions to involuntarily allot military pay to civil creditors pursuant to Department of Defense Directive 1344.9<sup>133</sup>, and Department of Defense Instruction 1344.12<sup>134</sup>. These involuntary allotments are not court-ordered executions or garnishments, and thus this section will not stay enforcement of such an involuntary allotment for non-marital debts. The Department of Defense will not enforce involuntary allotment requests where the creditor has failed to comply with SSCRA procedural requirements.<sup>135</sup>

In the proper case, a service member might use this section as authority to request a court to reduce the amount of alimony or child support the court has required him to pay.<sup>136</sup> Although the statutory language speaks only of relief in cases brought against the service member,<sup>137</sup> courts have granted relief to a husband who initiated a proceeding to determine the extent of his obligation for support and maintenance because of his change in circumstances when he entered military service.<sup>138</sup> The usefulness of this section may be limited by the advent of administrative support and paternity hearings mandated by the Welfare Reform Act of 1996.<sup>139</sup>

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<sup>132</sup>Bagley, *supra* note 62, at 13.

<sup>133</sup> U.S. DEP'T OF DEFENSE, DIR. 1344.9, INDEBTEDNESS OF MILITARY PERSONNEL (27 Oct 1994) [HEREINAFTER DOD DIR. 1344.9]. See also Major Howard McGillin, *Defenses to Involuntary Allotments for Creditor Judgments - Implementing the Hatch Act Reform Amendments*, The Army Lawyer, Jan. 1995, at 68.

<sup>134</sup> U.S. DEP'T OF DEFENSE, INSTR. 1344.12, INDEBTEDNESS PROCESSING PROCEDURES FOR MILITARY PERSONNEL (18 Nov 1994) [HEREINAFTER DOD INSTR. 1344.12].

<sup>135</sup> DOD INSTR. 1344.12, para. F.2.a.(4)(e).

<sup>136</sup>McGlynn v. McGlynn, 178 Misc. 530, 35 N.Y.S.2d 6 (Sup. Ct. 1942). See also Major James Pottorff, Note, *Alimony and Child Support Owed by Reserve Component Service Members Called to Active Duty*, The Army Lawyer, Mar. 1991, at 53.

<sup>137</sup>Rochester Ropes v. Beckworth Havens, 182 Misc. 548, 49 N.Y.S.2d 126 (Sup. Ct. 1944). The vitality of this section is limited by the growing trend of states to handle child support, alimony, and paternity support matters by administrative order and hearing, which are not covered by the SSCRA. See *supra* note 75.

<sup>138</sup>McKinney v. McKinney, 182 Misc. 903, 50 N.Y.S.2d 8 (Sup. Ct. 1944). See *supra* notes 116 and 128.

<sup>139</sup> See *supra* note 75 and accompanying text.

Additionally, one court ruled that once judgment against a service member-defendant is entered and stayed, a service member cannot question the entry of the judgment when the plaintiff appeals the court's order to suspend collection.<sup>140</sup>

### **3-10. Duration and Term of Stays; Codefendants Not in Service**

#### **Section 204**

(50 U.S.C. App. ? 524)

Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a co-defendant with others the plaintiff may nevertheless by leave of court proceed against the others.

This section is a companion provision to other sections of the Act that allow a court to grant a stay of proceedings because of military service. In this regard, with the exception of section 700, none of the stay provisions sets a specific duration for the stay. Ideally, absent other considerations, a service member can obtain a stay for his/her entire period of military service and three months thereafter. The actual duration of a stay will frequently depend on the equities of the case.<sup>141</sup> Generally, it is a bad idea to ask for the full statutory stay length, as civil courts are aware that service members may take leave to resolve civil court actions, even if they are overseas.<sup>142</sup> The better policy is for a commander to seek a stay for a service member only until they are able to take leave and defend or prosecute their civil court action. Litigation under this section principally arises when a court allows an action to proceed against an individual who is a co-defendant of the person in military service. A court will stay all proceedings in a consolidated action as to the non-service defendant when necessary to protect the interest of the service member.<sup>143</sup>

When a court grants relief in a factual situation specifically covered by one of the Act's provisions, however, the court must follow the duration provision contained in the specific section rather than the provisions of section 204.

### **3-11. Statute of Limitations as Affected by Period of Service**

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<sup>140</sup> Akron Auto Fin. Co. v. Stonebraker, 66 Ohio App. 507, 35 N.E.2d 585 (1941).

<sup>141</sup> See, e.g., Korsch v. Lambing, 28 N.Y.S.2d 167 (Sup. Ct. 1941).

<sup>142</sup> See *supra* notes 108-110 and accompanying text.

<sup>143</sup> Heck v. Anderson, 234 Iowa 379, 12 N.W.2d 849 (1944).

Section 205

(50 U.S.C. App. § 525)

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

This section of the Act tolls statutes of limitation during the period of military service of any military plaintiff or defendant.<sup>144</sup> Once military service is shown, the period of limitations is automatically tolled for the duration of the service.<sup>145</sup> The courts have held that this section is applicable to state governments,<sup>146</sup> municipal governments,<sup>147</sup> bankruptcy<sup>148</sup>, and administrative proceedings.<sup>149</sup> Whether

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<sup>144</sup> Courts may decide that the time period in question is not actually a statute of limitation. *See, e.g.,* Matter of Child Whose First Name is Baby Girl, 206 A.2d 932, 615 N.Y.S. 2d 800 (N.Y. App. Div. 1994)(6 month period not statute of limitations, but period of ripening of legal interests into Constitutionally protected interest). In addition, the provision only applies to the time period before bringing a suit. It does not extend time periods within a suit, such as time periods to avoid motions to dismiss for failure to prosecute an action. *Dellape v. Murray*, 651 A. 2d 638 (Pa. Commw. Ct. 1994). *See also* Romauldo P. Eclavea, Annotation, *Tolling Provision of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.A. Appx. § 525)*, 36 A.L.R. FED. 420 (1978); Note, *Soldiers' and Sailors' Civil Relief Act Update: Section 525 Means What It Says*, The Army Lawyer, June 1993, at 50. This provision also applies to Reserve Component active military duty service, but not weekend drill or individual unit training. *Min v. Avila*, 991 S.W.2d 495, 1999 Tex. App. LEXIS 3452 (Tex. App. 1999).

<sup>145</sup> *Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975). See however the unusual rulings in *In re Melicia L. v. Raymond L.*, 254 Cal. Rptr. 541 (Cal. 4th 1988) and *In re Sarah C. v. Paul D.*, 11 Cal. Rptr.2d 414 (Cal. 4th 1992) (court held that 1-year reunification period for putative father and child prior to termination of parental rights was not tolled by SSCRA because father had failed to request stay of proceedings (even though father unaware of proceedings)). It appears that the California court misread the tolling provisions of the SSCRA which are automatic; requesting a stay of proceedings is not a prerequisite.

<sup>146</sup> *Parker v. State*, 185 Misc. 584, 57 N.Y.S.2d 242 (Ct. Cl. 1945).

<sup>147</sup> *Calderon v. City of New York*, 184 Misc. 1057, 55 N.Y.S.2d 674 (Sup. Ct. 1945).

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the cause of action accrued prior to or during the period of service is immaterial.<sup>150</sup> This section is inapplicable, however, to periods of limitations imposed by federal internal revenue laws.<sup>151</sup> Courts have recently changed the approach to applying this section to certain suits against the government.<sup>152</sup>

Unlike other general relief provisions, section 205 does not require service member's to show their military service materially affected their ability to participate in the proceedings.<sup>153</sup> Courts have no  
(..continued)

<sup>148</sup> *In re Robins Co., Inc. v. Dalkon Shield Claimants Trust*, 996 F.2d 716 (4th Cir. June 22, 1993) ("Plain language of [SSCRA] requires that time periods such as that fixed by the bar date [for filing claims against A.H. Robins as part of the Chapter 11 reorganization plan] be tolled in favor of military personnel.... the statue on its face applies to toll the claim filing period in favor of Major Anderson. [It] contains no exceptions and is drafted in extraordinarily broad terms.... section 525 itself contains no hint of an exception for bankruptcy or any other type of proceeding....").

<sup>149</sup> *Shell Oil Co. v. Industrial Comm'n*, 407 Ill. 186, 94 N.E.2d 888 (1950).

<sup>150</sup> *In re Thompson v. Reedman*, 201 F. Supp. 837 (E.D. Pa. 1961); *Wolf's Estate*, 264 F.2d 82 (3rd Cir. 1959).

<sup>151</sup> SSCRA § 207. *Stone v. C.I.R.*, 73 T.C. 617 (1980); *see Allen v. United States*, 439 F. Supp. 463 (D.C. Cal. 1977) (statute of limitations which barred relief to taxpayer in action brought to recover alleged overpayment of federal income tax paid while taxpayer was a member of armed services was not tolled by the Act).

<sup>152</sup> *Detweiler v. Pena*, 38 F. 3d 591 (D.C.Cir., 1994)(statutory language broad and unambiguous - all statutes of limitations are tolled, including filing with Board for Correction of Military Records [BCMR]) *overruling Allen v. Card*, 799 F. Supp. 158 (D.C. 1992) (SSCRA does not toll 3-year period for filing complaints with BCMR). *Accord*, *Hanes v. United States*, 44 Fed. Cl. 441, 443 (1999). *See also Mouradian v. John Hancock*, 1989 WL 225052 (1st Cir. 1989), remanded 751 F. Supp. 272 (D. Mass. 1990), *aff'd* 930 F. 2d 972 (1st Cir. 1991) (the armed services tolling provision in the Labor Management Relations Act, which required a showing of material effect, applied in this collective bargaining case, instead of the general tolling provision of the SSCRA). *See also In re Robins Co., Inc. v. Dalkon Shield Claimants Trust*, 996 F.2d 716 (4th Cir. June 22, 1993) ("Plain language of [SSCRA] requires that time periods such as that fixed by the bar date [for filing claims against A.H. Robins as part of the Chapter 11 reorganization plan] be tolled in favor of military personnel.... the statue on its face applies to toll the claim filing period in favor of Major Anderson. [It] contains no exceptions and is drafted in extraordinarily broad terms.... section 525 itself contains no hint of an exception for bankruptcy or any other type of proceeding...."). *See also Davis v. Dep't of the Air Force*, 51 M.S. P.R 246 (1991) and *Lybrook v. Dep't of the Navy*, 51 M.S.P.R. 241 (1991) (MSPB actions tolled); Major Howard McGillin, *Tolling of Statutes of Limitations*, *The Army Lawyer*, Mar. 1995, at 41; Major Douglas Bradshaw, Ms. Marilyn Byczik, and Ms. Julie A. Buser, *Soldiers' Tort Claims and the Soldiers' and Sailors' Civil Relief Act*, *The Army Lawyer*, Jul. 1991, at 36.

<sup>153</sup> *Syzemore v. Sacramento County*, 127 Cal. Rptr. 741, 55 C.A.3d 517 (1976) (section is applicable without regard to prejudice to service member).

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discretion in applying section 205, which is always self-executing.<sup>154</sup> No stay request is required to assert the tolling provision of section 205. However, the tolling of the statute of limitations does not prevent the conveyance of a deed-in-lieu of foreclosure from a service member's assignees while the service member is on active duty.<sup>155</sup>

Section 205 sometimes has the effect of a two-edged sword. It can operate both to the advantage and to the disadvantage of a service member because it applies to actions by or against the service member.<sup>156</sup>

This section tolls any period of limitation established "by any law, regulation, or order... in any court, board, bureau, commission, department, or other agency of the government" whether related to administrative proceedings, periods for redemption of real estate, enforcement of tax obligation (not federal taxes) or assessment. While the SSCRA does not limit application of this provision to a single term of enlistment or to a specified period of career service, lower courts had interpreted this provision various ways with some requiring a showing of material effect for career personnel to invoke protection. In *Pannell v. Continental Can Co.*,<sup>157</sup> the Fifth Circuit relied on two state court decisions<sup>158</sup> in holding that the Act is inapplicable to a career service member.

On 31 March 1993, the Supreme Court settled the issue in *Conroy v. Aniskoff*, 507 U.S. 511, 113 S.Ct. 1562 (1993), reversing *Conroy v. Danforth*, 599 A.2d 426 (Me. 1992). There is **no** requirement to show material effect.

The Maine court affirmed a judgment that the SSCRA did not protect an Army Colonel on active duty from running of an 18-month redemption period following statutory foreclosure of a tax lien mortgage for nonpayment of taxes; the court ruled that a career service member must prove material effect to toll the redemption period, despite the language of the statute which does not require a showing of material effect.

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<sup>154</sup>Newman v. Newman, 234 Ga. 297, 216 S.E.2d 79 (1975); Van Heest v. Verch, 58 N.J. Super. 427, 156 A.2d 301 (1959).

<sup>155</sup>Wells v. Brown, 9 Vet. App. 293 (1996).

<sup>156</sup>See Ray v. Porter, 464 F.2d 452 (6th Cir. 1972); see also Carr v. United States, 422 F.2d 1007 (4th Cir. 1970) (tolls a limitation provision if action is either against any person in military service or is against his heirs, executors, administrators, or assigns); Hamner v. BMY Combat Systems, 869 F. Supp. 888 (D. Kan., 1994), *aff'd*, 79 F.3d 1156 (10<sup>th</sup> Cir. 1996) (soldier injured in alleged tort while on active duty - files suit 2 years and one day after discharge - statute of limitations 2 years - suit dismissed). But see Card v. American Brands Corp., 401 F. Supp. 1186 (D.C.N.Y. 1975), and Wanner v. Glen Ellen Corp., 373 F. Supp. 983 (D.C. Vt. 1974) (holding statute of limitations not tolled for wife of service member bringing suit in her own name). Hostetter, *supra* note 22, at 41.

<sup>157</sup>Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977).

<sup>158</sup>Bailey v. Barranca, 83 N.M. 90, 488 P.2d 725 (1971); King v. Zagorski, 207 So. 2d 61 (Fla. D. Ct. App. 1968).

The Supreme Court held that there is no requirement to show service materially affects a career service member to toll a statute of limitations; the language of section 205, SSCRA is clear.

Recently, the government has invoked the doctrine of laches in wrongful discharge claims against the United States. The government has argued that, although military service tolls the statute of limitations, lengthy delays in filing claims prejudice the government's ability to defend and also significantly increase the government's liability to pay for unrendered services it does not need or want.<sup>159</sup> The laches theory has had mixed success in the courts, but it is another example of how defendants may avoid the effects of section 205. Recently, in a case extending the SSCRA tolling provision to the BCMR, the D.C. Circuit examined laches and reaffirmed its *potential* applicability to SSCRA tolled cases.<sup>160</sup>

### **3-12. Maximum Rate of Interest**

#### **Section 206**

(50 U.S.C. App. § 526)

No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a person in military service before that person's entry into that service shall, during any part of the period of military service, bear interest at a rate in excess of 6 percent per year unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in the military service to pay interest upon such obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability.

This section provides that the rate of interest on debts incurred by service members prior to service shall not exceed 6 percent per year during their period of service. To avoid application of this section, a creditor must show that the ability of the service member to pay more is not materially affected by reason of military service. The term "interest" includes both service and carrying charges.

During a Reserve Component activation, reserve soldiers regularly invoke this provision, although it also applies to new active component officers and enlisted personnel. Active component soldiers seldom invoke this provision because of the requirements that (1) the soldier's military service

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<sup>159</sup>Deering v. United States, 620 F.2d 242 (Ct. Cl. 1980). *See also* Foster v. United States, 733 F.2d 88 (Fed. Cir. 1984) (laches effective as an affirmative defense against claims filed seven, eight, and nine years after accrual); Hankins v. United States, 7 Cl. Ct. 698 (1985). *See contra* Cornetta v. United States, 851 F.2d 1372 (Fed. Cir. 1988) (government failed to demonstrate sufficient prejudice from defendant's delay to invoke defense of laches).

<sup>160</sup>Detweiler v. Pena, 38 F.3d 591, 595-96 (D.C. Cir. 1994).

must materially affect the ability to pay the obligation; and (2) the obligation must predate the active service. Many new active component officers and enlisted soldiers, fresh from college or high school, actually experience enhanced financial well-being upon entering active duty. The opposite situation is often true for many reserve officers and enlisted personnel who leave well-paying civilian jobs to take financially less lucrative military assignments upon activation or voluntary active duty.

A reserve component call-up, such as Operation Desert Shield/Storm in 1990 - 1991, demonstrated this anomaly.<sup>161</sup> Many reserve component soldiers during Desert Storm duty experienced financial difficulties because their military pay and benefits did not match their civilian pay. Nearly all of the reserve financial commitments were pre-service. Although the reserve component soldiers may have entered these commitments while members of the reserve components, they nevertheless will have entered the commitments before entry on active duty.

Most creditors will likely assert that they will abide by the SSCRA and limit interest rates to six percent for those soldiers meeting the criteria set out above. In fact, this provision of the SSCRA puts the burden on the creditor to demonstrate that a soldier's military service is *not* affecting the ability to repay a loan. Attorneys should take the initiative and advise clients' creditors if financial obligations cannot be met. This is a far better course than allowing a client to go into default and then invoking the SSCRA after the fact, as a defense. One federal court has held that service members may sue creditors that fail to forgive interest above six percent.<sup>162</sup>

How do you determine what constitutes "material effect" to qualify for the six percent interest cap? The SSCRA does not define the term, and leaves it up to a case-by-case factual review. The normal rule of thumb is whether the service member's pre-service income is greater than his military income.<sup>163</sup> If a service member has a drop in income upon entering military service, but still has significant savings or assets that could easily pay the debt or obligation, that a creditor may challenge his claim of "material effect" for the six percent interest cap.

If they have joint contractual liability with the service member, dependents receive the 6% interest rate protection. What if a married person joins active service and his or her income **increases**

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<sup>161</sup> See Major James Pottorff, Note: *Protection for Active and Reserve Component Soldiers*, The Army Lawyer, Oct. 1990, at 48; Major James Pottorff, Note: *A Look at the Credit Industry's Approach to the Six Percent Limitation on Interest Rates*, The Army Lawyer, Nov. 1990 at 49; Major James Pottorff, Note: *Guaranteed Student Loans and the Six Percent Interest Cap*, The Army Lawyer, Jan. 1991, at 52; James Pottorff, *Soldiers' and Sailors' Civil Relief Act Protection for Reserve Component Servicemembers Called to Active Duty*, Virginia Law Register, Dec. 1990, at 7; Kathleen H. Switzer, *Benefits for Reserve and National Guard Members Under the Soldiers' and Sailors' Civil Relief Act of 1940*, 110 BANKING L.J. 517 (Nov. 1993); Larry Carpenter, *The Soldiers' and Sailors' Civil Relief Act: Legal Help for the Sudden Soldier*, 25 ARK. LAW. 42 (Apr. 1991); Joseph Chappelle, Legal Primer for Advising the Deployed Servicemember, 34 RES GESTAE 494 (May 1991).

<sup>162</sup> Moll v. Ford Consumer Finance Company, Inc., 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998)(unpub.). Accord, Marin v. Citibank, N.A., 208 F.3d 203 (2d Cir. 2000).

<sup>163</sup> Hostetter, *supra* note 21, at 36-37; and Day, *supra* note 104.



but, because his or her non-military spouse quits his or her job to maintain a joint household with the service member, the couple's **joint** income decreases? Could they invoke the 6% interest cap on a joint obligation? 50 U.S.C. App. § 513 protects those primarily or secondarily liable on service member's obligation. The problem is "material effect." The creditor may try to argue that the military person's income has increased and because the dependent voluntarily gave up his or her former job, military service did not effect their income. The answer is not clear. What if the non-military spouse was **not** jointly liable? 50 U.S.C. App. § 536 only extends SSCRA benefits to dependents in their own right for App. §§ 530-536; other protections are derivative (see Chapter 4). The 6% interest limitations are in App. § 526. In this situation, the creditor may try to argue that the non-military spouse's income is irrelevant because credit was extended solely to the military member.<sup>164</sup>

One issue invariably arising when a service member invokes this provision of the SSCRA pertains to interest above six percent. What happens when a loan agreement provides that the debtor will pay interest at an annual rate of 14 percent? Is the difference of eight percent forgiven or accrued? Some creditors will likely attempt to accrue it. For example, some bank loan servicing rules may allow a six percent cap during active service, but consider the excess to be a delinquency that must be paid within three months of leaving service.<sup>165</sup> Another common ploy is for a lender to agree to reduce the interest rate to six percent, but increase the payments on principal to the point that they equal the pre-service payment amount, thereby paying off the loan early. This approach also violates the intent of the legislation.<sup>166</sup> Another clever ploy by creditors is to agree to reduce the loan to the six percent cap, but to charge a series of new finance charges for "refinancing" the loan.<sup>167</sup> Another variation of this approach is for the lender to agree to the six percent interest cap, but then "refinance" the loan based upon the remaining years left on the mortgage, rather than on the number of years of the original mortgage contract. This approach also violates the intent of section 526, in that the "refinanced" mortgage loan will have higher monthly payments at the six percent rate than a service member would pay if the new mortgage was based upon the original term of years.<sup>168</sup>

This approach is contrary to Congressional intent when this provision was enacted as an amendment to the SSCRA in 1942. Referring to the original law, enacted in 1940, a Senate Report noted that it did not "prevent an accumulation of excess interest" and only allowed for a stay of

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<sup>164</sup> *Ibid.*

<sup>165</sup> *Contra* S. REP. NO. 1558, 77th Cong., 2d Sess. 4 (1942) and *Moll v. Ford Consumer Finance Company, Inc.*, \_\_F. Supp.\_\_, 1998 U.S. Dist. LEXIS 3638, \*12-15 n.5, *citing* 101 CONG. REC. S2142 (1991) (statement of Senator Joseph Biden).

<sup>166</sup> James P. Pottorff, *Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*, 132 MIL. L. REV. 115, 131-133 (1991). *See also* Office of Comptroller of the Currency Advisory AL-91-1, 1991 OCC CB LEXIS 13 (13 March 1991); and *Moll v. Ford Consumer Finance Company, Inc.*, 1998 U.S. Dist. LEXIS 3638, at \*12n.5.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

### Chapter 3 - General Relief - Interest Rates, Judicial Proceedings

proceeding in the event collection action was initiated.<sup>169</sup> The amendment, however, was intended to correct this situation. It prohibited "interest at a rate in excess of 6 percent . . ."<sup>170</sup> During debate in the House of Representatives, Congressman Kilday, a member of the House Committee on Military Affairs, explained this provision. He stated that "while a man is in service the interest on his contract shall not exceed 6 percent per annum."<sup>171</sup> Accordingly, interest in excess of six percent cannot be accrued during active service; it must be forgiven.

Although most interest rates in 1942 were very low, Congressman Kilday noted that some states at that time allowed interest rates of up to three percent per *month*.<sup>172</sup> Consequently, Congress did anticipate interest rates substantially in excess of six percent at the time this provision was enacted, arguments of some creditors notwithstanding.

As a consequence of this section, when a service member owes money and the interest rate is more than 6 percent per year, the rate must be reduced to 6 percent when the debtor enters military service. The protection ends, however, if the creditor convinces a court that the service *member's* ability to pay is not materially affected by military service. What if your client comes to see you to assert the six percent interest cap, after they have been on active duty for over a year, or they are back from deployment. Does a creditor have to backdate any interest cap and credit the service member? Arguably, the recent *Moll v. Ford Consumer Finance Company, Inc.*, case provides service members with a means to privately sue creditors and lenders that wrongly refuse to credit service members with the six percent interest cap.<sup>173</sup> One can argue that the law would still apply, and the creditor still has the burden to prove no material effect. The creditor has a very strong argument in such cases that the service member must not have been materially affected if the soldier had paid the full amount owed for the past year or deployment. In such cases, legal assistance attorneys need to argue the intent of the law to protect service members "with an eye friendly to those who dropped their affairs to answer their country's call."<sup>174</sup>

May a creditor demand proof of material effect upon entry to active duty? Technically, no: the burden of proof is on the lender. Still, service members are best advised to notify their lenders of their intent to invoke the 6% interest cap in writing, along with proof of mobilization/activation to active duty and evidence of the difference in the debtor's military and civilian pay.<sup>175</sup> What if the lender requires the service member debtor to fill out a list of current debts, assets, and other sources of income, or a new loan application before they will consider granting a 6% interest cap request? Such conduct would

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<sup>169</sup> S. REP. NO. 1558, 77th Cong., 2d Sess. 4 (1942).

<sup>170</sup> *Id.*

<sup>171</sup> 88 CONG. REC. 5366 (1942).

<sup>172</sup> *Id.*

<sup>173</sup> *Moll v. Ford Consumer Finance Company, Inc.*, 1998 U.S. Dist. LEXIS 3638.

<sup>174</sup> *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

<sup>175</sup> See Chapter 8, Appendix A. Model 6% Interest Letter to Lender.

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violate the spirit of section 526 and section 518, by indicating the creditor's intent to reappraise the customer's creditworthiness. The lender did an evaluation of the debtor when it approved the debt, and the debtor may not be subjected to further questions as to creditworthiness. Ultimately, the burden lies on the creditor.<sup>176</sup>

How do you enforce this provision short of defaulting on a loan or obligation and raising the interest cap as a defense, when a creditor refuses to honor the SSCRA? You seek the assistance of the local U.S. Attorney, after coordinating with your supervisors or advise your client to sue the lender/creditor.<sup>177</sup> Be creative in utilizing state consumer protection statutes, the Fair Credit Reporting Act, and the Truth in Lending Act, in fashioning a remedy.<sup>178</sup>

This section does not apply to transactions entered into after entry into military service.<sup>179</sup> Attorneys should consider this section, however, in connection with section 700 (50 U.S.C. App. §? 590) in making any application for relief from pre-active duty financial obligations.

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<sup>176</sup> Pottorff, *supra* note 155, at 133. Legal assistance counsel may want to consider use of an installation Armed Forces Disciplinary Control Board, to put off-limits to military personnel a financial institution that repeatedly violates section 526. This works particularly well in smaller communities near major military installations, where the military has some leverage with the local business community to encourage SSCRA compliance. See Army Regulation 190-24, Military Police: Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Services (Jun. 30, 1993).

<sup>177</sup> *Moll v. Ford Consumer Finance Company, Inc.*, 1998 U.S. Dist. LEXIS 3638.

<sup>178</sup> Hostetter, *supra* note 21, at 36-37. See also *Crump v. Chrysler First Fin. Serv. Corp.*, No. 92 CVS 33 (Sup. Ct. Caldwell County, North Carolina 1992) (lender reduced interest rate, but not payments. Service member missed a balloon payment and received a bad credit report. The soldier sued the lender for SSCRA violations (six percent cap), Fair Credit Reporting Act violations and North Carolina Unfair Trade Practices Act--case settled favorable for soldier); *United States ex. rel. Bennett v. Am. Home Mortgage*, (D. N.J. 1990) (unpublished settlement on file with editor)(Desert Storm National Guard soldier's mortgage lender reduced interest rate, but not monthly payments. U.S. Attorney intervened and negotiated a settlement with the lender favorable to the soldier).

<sup>179</sup> *Shield v. Hall*, 207 S.W.2d 997 (Tex. 1948).

### Chapter 3 - General Relief - Interest Rates, Judicial Proceedings

Many soldiers upon entry to active duty have student loan debts. A Department of Education (DE) memorandum<sup>180</sup> affects application of the six percent limitation. It states that this limitation of interest rates is ineffective with respect to guaranteed student loan obligations (formerly called GSL's now FFLEP's<sup>181</sup>). According to DE, Section 1078(d), Title 20, United States Code,<sup>182</sup> affects the scope of the SSCRA protection. Section 1078(d) states that no provision of any Federal or State law that limits the interest rate on a loan will apply to the government student loan program. DE's position is that this renders ineffective the section 206 interest cap if the loan in question is federally insured. All other types of loans and credit arrangements, however, remain unaffected by section 1078(d). Accordingly, other provisions of the SSCRA, including those providing for a stay of proceedings<sup>183</sup> and reopening default judgments<sup>184</sup> remain available to debtors.

While the six percent protection is not available for holders of FFLEP's, the DE will permit lenders to forbear or to defer payments. A soldier may apply to a lender for an emergency forbearance.<sup>185</sup> "Forbearance" means permitting the temporary cessation of payments, allowing an extension of time for making payments, or accepting smaller payments than were previously scheduled.<sup>186</sup> According to the DE memorandum<sup>187</sup>, a lender may grant an emergency forbearance for up to six months based on a phone call or written request from the borrower or a close family member. The borrower and lender must enter a written agreement for an extension of forbearance beyond six months.

Borrowers serving on active duty, including Reserve Component personnel on active duty, would probably be better served by applying for a military deferment of their federally insured student loans. The Higher Education Amendments of 1992, Pub. L. 102-325, significantly changed deferments available to borrowers under FFLEP. Under 20 U.S.C. § 1078(b)(1)(M), as revised, there is no

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<sup>180</sup>Department of Education Memorandum, *GSL Borrowers Adversely Affected by the Recent U.S. Military Mobilizations* (August 29, 1990); see also Office of The Judge Advocate General Memorandum, *Operation DESERT SHIELD Legal Assistance Issues II* (October 12, 1990). Major James Pottorff, Note, *Guaranteed Student Loans and the Six Percent Interest Cap*, The Army Lawyer, Jan. 1991, at 52.

<sup>181</sup>FFLEP includes four types of student loans: Federal Stafford Loans (formerly GSL); Federal Supplemental Loans for Students (SLS); Federal PLUS loans; and Federal consolidation Loans.

<sup>182</sup>Congress passed this provision as section 428(d) of the Higher Education Act of 1965.

<sup>183</sup>50 U.S.C. App. § 521 (1994).

<sup>184</sup>*Id.*, 50 U.S.C. App. §520.

<sup>185</sup>See 34 C.F.R. § 682.211 (1997). The Secretary of Education encourages lenders to grant forbearance in order to prevent borrowers from defaulting. See also Higher Education Technical Amendments Act of 1991, Pub. L. No. 102-26 (April 9, 1991).

<sup>186</sup>*Id.*, 34 C.F.R. § 682.211(a)(1).

<sup>187</sup>The DE Memorandum referred to pre-1990 federal Guaranteed Student Loans (GSLs).

longer an automatic deferment for military personnel. Borrowers receiving loans on or after 1 July 1993, are entitled only to deferments on limited grounds (for military personnel, the most likely ground to use is economic hardship or military mobilization). DE has developed regulations to implement the provisions.<sup>188</sup>

For older loans, borrowers serving for up to three years on active duty in the Armed Forces or the Commissioned Corps of the Public Health Service may receive an automatic (upon application) military deferment.<sup>189</sup> In most cases, a deferment means a borrower will have periodic installment payments of principal deferred during active service of up to three years. If a soldier entered a GSL agreement before October 1, 1981, he or she may also apply for a six month grace period of deferment that begins after the completion of the deferment period for military service. Interest, however, will usually accrue and must be paid by the borrower during the deferment period, and during any post-deferment grace period.

Soldiers will often be unaware of the availability of military deferments and not submit requests concurrent with orders to active duty. DE regulations should be checked to see if there is authorized a late filing period. The request for deferment should include documentation sufficient to establish eligibility for deferment. In most cases, a copy of orders calling a soldier to active duty should be sufficient.

The Higher Education Technical Amendments of 1991 (Public Law 102-26 signed April 9, 1991) provided additional assistance to reservists called to duty during Operation Desert Shield/Storm. The amendments include extended deferment periods.

For loans that do not qualify for the six percent cap on interest, such as those in which nonmilitary spouses are separately obligated, as well as loans that do not qualify for military deferments, negotiation remains the key. Lenders will often agree to reduced or deferred payments when informed that an individual who has either directly or indirectly been making payments has been ordered to active duty.

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<sup>188</sup> See 34 C.F.R. §§ 682.210 and 682.211 (1997).

<sup>189</sup> *Id.*, 34 C.F.R. §682.210(b)(3) (1997).

**3-13. Federal Income Taxes**

Section 207

(50 U.S.C. App. § 527)

Section 205 of this Act shall not apply with respect to any period of limitation prescribed by or under the internal revenue laws of the United States.<sup>190</sup>

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<sup>190</sup>See *Stone v. C.I.R.*, 73 T.C. 617 (1980) (the section 205 provision tolling the statute of limitations is inapplicable to any limitations period under internal revenue laws); and *Allen v. United States*, 439 F. Supp. 463 (C.D. Ca. 1977).



## **Chapter 4 - Rents, Mortgages, Foreclosures**

### **Eviction, Installment Contracts, Mortgage Foreclosures, Lease Terminations, Anticipatory Relief, Extensions of Benefits to Dependents**

#### **4-1. Purpose and Scope**

This chapter examines Articles III and VII of the Soldiers' and Sailors' Civil Relief Act. Article III contains sections 300 through 306 (50 U.S.C. App. §§ 530-536), which relate to evictions, lease terminations, installment sales contracts, repossessions, mortgage foreclosures on real and personal property, storage lien foreclosures, and the rights of life insurance contract assignees. The benefits of Article III are the only ones the Act extends to both service members and their family members in their own right.<sup>1</sup> Article VII contains sections 700, 702, and 703 (50 U.S.C. App. §§ 590, 592, and 593) which relate to seeking relief from financial obligations before defaulting on the payments, professional liability protection for health care workers, and health insurance reinstatement. The last two topics will be discussed in Chapter 5, Insurance.

#### **4-2. Extension of Benefits to Dependents**

##### **Section 306**

(50 U.S.C. App. § 536)

Dependents of a person in military service shall be entitled to the benefits accorded to persons in military service under the provisions of this article upon application to a court therefor, unless in the opinion of the court the ability of such dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applicants are dependent.

Under the terms of this section, dependents of military personnel may apply to a court for the benefits of all the sections under Article III.<sup>2</sup> If the court finds that the dependent's ability to comply with the terms of a contract or other obligation is materially affected by the military service of the person upon whom he or she is dependent, then the court is authorized to grant the dependent at least the same degree of relief to which the service member would be entitled.<sup>3</sup> What if the "dependent" entered a

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<sup>1</sup> 50 U.S.C. App. § 536 (1994) provides dependents protection in their own right for Article III benefits (App. §§ 530-536). Other protections are derivative from a joint obligation with the service member.

<sup>2</sup> While section 700 is included in this chapter, the extension of benefits to dependents applies to Article III only.

<sup>3</sup> See, e.g., *Reid v. Margolis*, 181 Misc. 222, 44 N.Y.S.2d 518 (1943); *Pfeiffer v. McGarvey*, 61 F. Supp. 570 (E.D. Pa. 1945);



financial obligation before he or she married and before that spouse entered the military? He or she should be afforded Article III protection.<sup>4</sup>

Congress added this section in 1942 to avoid situations in which dependents suffered as a result of the service member's period of service. It applies the situations such as the foreclosure of a mortgage on the home of a widowed mother, entirely dependent upon her soldier son, because she herself was not a "person in the military service."<sup>6</sup>

Since the Act does not define "dependent," the courts have treated this as a question of fact to be determined in each individual case. The courts have determined whether the individual invoking the Act is dependent upon a service member for support and maintenance. One court held that this section does not protect a business partner.<sup>6</sup>

#### **4-3. Eviction and Distress**

##### Section 300

(50 U.S.C. App. § 530)

(a) No eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$1,200 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession.

(b) On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this Act, or it may make such other order as may be just. Where such stay is granted or other order is made by the court, the owner of the premises shall be entitled, upon application therefor, to relief in respect of such premises similar to that granted persons

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<sup>4</sup> See *Tucson Telco? Federal Credit Union v. Bowser*, 451 P.2d 322 (Ariz. Ct. App. 1969) (single woman entered chattel mortgage on car, was subsequently married to civilian who was later drafted; car registered solely in her name and she alone made payments before repossession; court held that repossession without court order violated § 532, SSCRA. SSCRA applied because her ability to pay was impaired by husband's subsequent induction). Could the woman in the *Bowser* case have invoked the 6% interest cap of App. § 526? No. Her military husband was not a joint obligor on the car loan).

<sup>5</sup> See *Great Barrington Sav. Bank v. Brown*, 239 Mass. 546, 132 N.E. 398 (1921).

<sup>6</sup> *Patrikes v. J.C.H. Serv. Stations, Inc.*, 42 N.Y.S.2d 158 (N.Y. City Ct. 1943), *aff'd* 46 N.Y.S.2d 233 (N.Y.A.D. 1943).

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in military service in sections 301, 302, and 500 of this Act [50 U.S.C. App. §§ 531, 532, and 560] to such extent and for such period as may appear to the court to be just.

(c) Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (a), or attempts so to do, shall be fined as provided in title 18, United States Code, or imprisoned not to exceed one year, or both.

(d) The Secretary of Defense or Secretary of Transportation, with respect to the Coast Guard when it is not operating as a service in the Navy, is empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person.

*a. General.* This section protects service members and their dependents from eviction for nonpayment of rent.<sup>7</sup> It provides criminal sanctions<sup>8</sup> for those who knowingly take part in the eviction or attempted eviction of the spouse, children, or other dependents of a service member from any premises occupied as a dwelling and rented for less than \$1,200 per month. In these circumstances, a landlord must obtain a court order authorizing an eviction.<sup>9</sup> The Act does not define the terms "eviction" and "distress," but the courts have applied their commonly accepted meanings in deciding cases arising under this section.<sup>10</sup>

*b. Application.* The provisions of this section apply when the following conditions exist:

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<sup>7</sup>The provisions of this section are entirely different from, and not to be confused with, the provisions of section 302, which deal with mortgages, trust deeds, etc. *Union Labor Life Ins. Co. v. Wendeborn*, 19 N.J. Misc. 496, 21 A.2d 317 (1941).

<sup>8</sup>A violation of this section will also support an action for damages for wrongful eviction, including an award of punitive damages. *Spampinato v. M. Breger & Co.*, 226 F.2d 742 (2d Cir. 1955), *cert. denied*, 350 U.S. 973, *reh'g denied*, 350 U.S. 1009 (1956); *Prather v. Clover Spinning Mills*, 215 S.C. 103, 54 S.E.2d 529 (1949).

<sup>9</sup>Pub. L. No. 89-358, § 10, 80 Stat. 28 (1966), raised the rent ceiling amount from \$80 to \$150 per month.

<sup>10</sup>"Eviction "means" a dispossession of a tenant by a landlord." "Distress" is "the taking of another's personal property out of his possession either for holding or for sale in order to obtain satisfaction of a part due rent claim." *Leshner v. Louisville Gas & Elec. Co.*, 49 F. Supp. 88 (W.D. Ky. 1943); *Arkless v. Kilstein*, 61 F. Supp. 886 (E.D. Pa. 1944).

(1) A landlord attempts an eviction or distress<sup>11</sup> during the period of military service, or after receipt of orders to report to duty as provided in section 106 of the Act;

(2) The premises are occupied as a dwelling by the spouse, children, or other dependents of the service member;<sup>12</sup> and,

(3) The agreed rent does not exceed \$1,200 per month.

Prior to the 1991 amendments, section 300 purported to apply only to those cases in which the rent did not exceed \$150; however, at least one court granted relief when the amount of monthly rent exceeded \$150. In *Balconi v. Dvascas*,<sup>13</sup> the monthly rent was \$340, but the court held that a service member's child and ex-wife were eligible under the Act for protection against eviction. The court concluded that the rent was actually less than \$150 if adjusted for inflation occurring since 1966, when Congress raised the maximum rent from \$80 to \$150. This rationale may be helpful subsequent to the 1991 amendment.

Courts have required that a landlord-tenant relationship exist since this section contemplates a disturbance of that relationship.<sup>14</sup> One court has, however, held this section to be applicable to a constructive eviction by the owner of a dwelling in which a service member's dependents were sub-tenants of the lessee.<sup>15</sup>

*c. Action in court; material effect.* A landlord may evict a service member or his/her dependents only "upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession." A reasonable interpretation of this provision is that the

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<sup>11</sup>For a case holding that the tenant may waive his rights to an action for wrongful distress under this section, see *State ex. rel. Myers v. Kodge*, 129 W. Va. 820, 42 S.E.2d 23 (1947).

<sup>12</sup>The persons entitled to protection under this section are those in the armed service or their dependents, who have an obligation to pay rent for the leased premises. *Pfeiffer v. McGarvey*, 61 F. Supp. 570 (E.D. Pa. 1945). See *Balconi v. Dvascas*, 133 Misc.2d 685, 507 N.Y.S.2d 788 (Rochester City Ct. 1986) (dependents include child and ex-wife who are financially dependent on service member).

<sup>13</sup>*Balconi v. Dvascas*, 133 Misc.2d 686, 507 N.Y.S.2d 788 (Rochester City Ct. 1986).

<sup>14</sup>See *Clinton Cotton Mills v. United States*, 164 F.2d 173 (4th Cir. 1947); *Leshner v. Louisville Gas & Electric Co.*, 49 F. Supp. 88; *Arkless v. Kilstein*, 61 F. Supp. 886.

<sup>15</sup>*Clinton Cotton Mills v. United States*, 164 F.2d 173.

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landlord must first obtain a court order authorizing the eviction.<sup>16</sup> The landlord may obtain the court order by applying to a proper court and showing that the service member's military service has no material effect upon the ability of his/her dependents to pay the rent.

Since the purpose of this section is to provide the service member protection against an eviction for nonpayment of rent,<sup>17</sup> the court must determine, in addition to whether a landlord-tenant relationship exists,<sup>18</sup> whether the tenant is a dependent of the service member. Additionally, the court must determine whether the tenant's ability to pay the agreed rent is *materially affected* by the service member's military service. Material effect is present when the service member does not earn sufficient income to permit him/her to pay the rent.<sup>19</sup> It is immaterial whether the dwelling was rented before or after entry on active duty.<sup>20</sup>

d. *Nature and extent of relief for lessee.* If the lessor files an application for an eviction order and the court finds that military service has materially affected the service member's ability to pay the rent, the court may on its own motion, and shall on application, either stay the eviction proceedings for not longer than three months,<sup>21</sup> or "it may make such other order as may be just."<sup>22</sup> In granting a three month stay, one court held that if the service member paid the fourth month's rent, he could not be

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<sup>16</sup>It is not necessary to file a petition for authority to commence the eviction proceeding; only "leave of court" is necessary before any actual eviction is proper. Eviction proceedings could be commenced against a service member without filing a petition for authority to commence the proceeding. *Cox v. McGregor*, 330 Mich. 260, 47 N.W.2d 87 (1951). See generally Annotation: *Construction of 301 and 700 of Soldiers' and Sailors' Civil Relief Act of 1940, as amended, Relating to Installment Contracts for Purchase of Property*, 24 A.L.R.2d 1074.

<sup>17</sup>See *London v. O'Connell*, 20 Misc.2d 168, 192 N.Y.S.2d 594 (N.Y. City Mun. Ct. 1959); *Bronson v. Chamberlain*, 53 N.Y.S.2d 172 (Syracuse Mun. Ct. 1945).

<sup>18</sup>See *Scanlan v. Garrick*, 326 Ill. App. 461, 61 N.E.2d 773 (1945); *Nassau Savings & Loan Ass'n v. Ormond*, 179 Misc. 447, 39 N.Y.S.2d 92 (Sup. Ct. 1942); *Prather v. Clover Spinning Mills*, 215 S.C. 103, 54 S.E.2d 529.

<sup>19</sup>See para. 4.4e, *infra*, for a full discussion of "material effect." For examples in which courts denied relief under this section because the petitioner failed to show that his ability to pay was materially affected by reason of his military service, see *Arkless v. Kilstein*, 61 F. Supp. 886; *Harvey v. Home Owners' Loan Corp.*, 189 Misc. 73, 67 N.Y.S.2d 586 (Sup. Ct. 1946).

<sup>20</sup>*Clinton Cotton Mills v. United States*, 164 F.2d 173.

<sup>21</sup>*Daily v. Kelly*, 304 Ky. 229, 200 S.E.2d 114 (1947).

<sup>22</sup>See, e.g., *Academy St. Corp. v. Calderson*, 38 Misc.2d 873, 238 N.Y.S.2d 853 (N.Y. City Ct. 1963); *Railroad Fed. Sav. & Loan Ass'n v. Morrison*, 179 Misc. 893, 40 N.Y.S.2d 319 (Sup. Ct. 1943).

evicted for failure to pay the previous rent. Also, the landlord could not evict him for not paying the rent that accrued during the period of the stay.<sup>23</sup> His obligation to pay the arrears was not abated, however.

*e. Extension of relief to lessor.* Section 300 also permits the landlord to apply for certain relief when the court has granted a stay of eviction. The landlord, in the court's discretion, may obtain a court order providing protection similar to a service member's protection under sections 301, 302 and 500 of the Act [50 U.S.C. App. §§ 531, 532, and 560].

*f. Compulsory rental deductions.* Section 300(4) authorizes the Secretaries of the respective services to order allotments from the pay of a service member to defray costs of renting premises occupied by the service member's dependents. However, current Defense Finance and Accounting Service regulations make no provision for such allotments.<sup>24</sup>

*g. Criminal sanctions.* Criminal sanctions include 1-year confinement and fine as provided in title 18, U.S.C. for taking part in an eviction in violation of this section.

#### **4-4. Installment Contracts**

##### Section 301

(50 U.S.C. App. § 531)

(1) No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease, or bailment, from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered the military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction.

(2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) of this section or in section 107, or attempts so to do, shall be fined as provided in title 18, United States Code, or imprisoned, not to exceed one year, or both.

(3) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and

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<sup>23</sup>Jonda Realty Corp. v. Marabotto, 178 Misc. 393, 34 N.Y.S.2d 301 (Sup. Ct. 1942).

<sup>24</sup> As to allotments, *see generally* DoD Financial Management Regulation, Volume 7A, Chapter 41, February 2000, available online at <http://www.dtic.mil/comptroller/fmr/07a>.

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resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interest of all parties.

*a. General.* Section 301 is designed to protect the service member who, prior to entry into military service,<sup>25</sup> has entered an installment contract for the purchase real or personal property. The provision prohibits creditors, without "action in a court," from terminating certain installment contracts and repossessing the property for nonpayment or breach occurring prior to or during military service.

*b. Application.* This section applies if the service member has entered either an installment contract for the purchase of real or personal property, or a contract of lease or bailment with a view to purchase real or personal property, prior to entry into military service. In addition, the service member must have paid, prior to entry into military service, a deposit or installment under the contract. The vendor is then prohibited from exercising any right or option under the contract to rescind or terminate the contract, to resume possession of the property for nonpayment of any installment due, or to breach the terms, except by action in a court of competent jurisdiction.<sup>26</sup> It is immaterial whether the nonpayment or other breach occurred prior to or during the period of military service.<sup>27</sup> May a service member who leased an automobile prior to military service use this section to cancel the lease because he or she got orders overseas? No. This provision prohibits **creditors** from terminating certain contracts, it does not allow the military member to cancel the agreement (but the service member might be able to use 50 U.S.C. App. § 590 to request a stay of enforcement of the obligation). What if the lessor of the auto seeks to repossess for service member's breach, does this section apply? The contract to lease must be with "**view to purchase**".... Therefore, the answer will depend on the specifics of the contract. Most auto leases do have an "option to purchase" clause. Legal assistance attorneys are best advised to contact the auto lease holder, suggesting that the soldier will surrender the collateral (leased auto) in return for a release from any deficiency judgments, early termination penalties or interest. Point out to the lease holder that they cannot repossess the vehicle without the costs and delay of a court order in case of non-payment, that the soldier may seek SSCRA stay of any legal

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<sup>25</sup>Jim's Trailer Sales, Inc. v. Shutok, 153 F. Supp. 274 (W.D. Pa. 1957).

<sup>26</sup>See, Hanson v. Crown Toyota Motors, Inc., 572 P.2d 380 (Utah 1977) (bank, with knowledge of Hanson's military status, repossessed auto and sold it without first filing a lawsuit, thus violating § 531. "Material effect" irrelevant. A showing of material effect is required only in those instances where repossession is an issue in "pending litigation"). In re Rouse, 8 UCC Rep. Serv. 578, 1970 W.L. 12582 (Bankr. E.D. Tenn. 1970) (finance company that improperly repossessed service member's motor vehicle could not seek deficiency judgment on discharged debt owed for vehicle).

<sup>27</sup>Hampton v. Commercial Credit Corp., 199 Mont. 476, 176 P.2d 270 (1946).

action, and the protection afforded by Section 590 to extend payments and stay any early termination or other penalties.<sup>28</sup>

This section does not prevent the parties from entering into a written agreement pertaining to repossession or forfeiture of the property, provided the parties execute the agreement subsequent to the service member's entry into active duty or his receipt of notice of induction.<sup>29</sup>

This section has no application to installment contracts entered into after entry upon active duty.<sup>30</sup> Nor does it apply where a deposit or installment has not been paid by or on behalf of the service member before he receives an induction notice or before he/she enters active duty.<sup>31</sup>

*c. Court action required.* As previously noted, this section prohibits the vendor from enforcing any of his/her rights under the contract except by action in a court of competent jurisdiction.<sup>32</sup>

Section 301(3) provides that "upon the hearing of such action the court may order . . ." one of three possible courses of action.<sup>33</sup> This phrase, along with the phrase, "action in a court of competent jurisdiction," indicates that the vendor must have a court order before taking any action with respect to the property in question.<sup>34</sup>

This section, however, does not prevent the court from taking action to bring the property into judicial custody. In *Universal C.I.T. Credit Corp. v. Ganter*,<sup>35</sup> the court construed "action in a court of competent jurisdiction" and held that the issuance and delivery to the sheriff of a summons, complaint, requisition, affidavit, and an action in replevin constituted an "action in a court of competent jurisdiction

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<sup>28</sup> Major James Pottorff, Note, *Applicability of SSCRA to Automobile Leases*, The Army Lawyer, December 1990, at 44.

<sup>29</sup>SSCRA § 107. See also *Hansen v. Ryan*, 186 S.W.2d 595 (Mo. 1945).

<sup>30</sup>*Jim's Trailer Sales, Inc. v. Shutek*, 153 F. Supp. 274 (W.D. Pa. 1957); accord, *Charles H. Jenkins v. Lewis*, 259 N.C. 86, 130 S.E.2d 49 (1963).

<sup>31</sup>*Cox v. McGregor*, 330 Mich. 260, 47 N.W.2d 87 (1951); *Ryan v. Bloom*, 120 Mont. 443, 186 P.2d 879 (1947), cert. denied, 333 U.S. 874 (1948).

<sup>32</sup>This section does not provide the service member-debtor any rights until after the vendor has sought to enforce the contract, either by repossession or through court action. *Application of Roosin*, 30 N.Y.S.2d 9 (Sup. Ct. 1941).

<sup>33</sup>See paragraph 4.3d, *infra*.

<sup>34</sup>See *Luke v. Mercantile Acceptance Corp. of Cal.* 111 Cal. App.2d 431, 244 P.2d 764 (1952).

<sup>35</sup>*Universal C.I.T. Credit Corp v. Ganter*, 182 Misc. 833, 44 N.Y.S.2d 908, 910 (Sup. Ct. 1943).

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as required by section 301 of the Soldiers' and Sailors' Civil Relief Act . . . and the action by the sheriff will not violate the provisions of that section.<sup>36</sup>

Court procedure is mandatory under this section of the Act.<sup>37</sup> Property repossessed without benefit of the requisite court action will subject the creditor to a suit for wrongful conversion<sup>38</sup> and criminal liability. In addition, several cases indicate that where oppression, fraud, or malice on the part of the creditor can be shown, punitive damages may be awarded.<sup>39</sup>

*d. Nature and extent of relief.* When an action by a creditor-vendor comes before a court under this section, three alternative courses of action are open to the court. First, the court may order repayment of any prior installments or deposits as a condition of terminating the contract and resuming possession of the property. Second, the court may order a stay of the proceedings,<sup>40</sup> as provided in this Act, during the period of military service and for 3 months thereafter.<sup>41</sup> Third, the court may make such other disposition of the case as may be equitable to conserve the interests of all

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<sup>36</sup>Note that the service member's interest was protected by the plaintiff's undertaking in replevin. Furthermore, the effect of this holding was to approve the action of the sheriff as an officer of the court, and not to allow the creditor to repossess without court action.

<sup>37</sup>*S. & C. Motors v. Carden*, 223 Ark. 164, S.W.2d 627 (1954).

<sup>38</sup>*See Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (Utah 1977); *Pacific Finance Corp. v. Gilkerson*, 217 S.W.2d 440 (Tex. Civ. App. 1949); *Application of Aber*, 180 Misc. 736, 40 N.Y.S.2d 48 (Sup. Ct. 1942); *Hampton v. Commercial Credit Corp.*, 119 Mont. 476, 176 P.2d 270 (1946).

<sup>39</sup>*Hampton v. Commercial Credit Corp.*, 119 Mont. 476, 176 P.2d 270. *See also Bowling v. Stark*, 268 So.2d 201 (Fla. App. 1972).

<sup>40</sup>The court may grant the stay on its own motion, or on motion by the service member or someone on his behalf.

<sup>41</sup>SSCRA § 204, and SSCRA § 101(2).



parties.<sup>42</sup> These three types of relief are predicated upon a finding that the ability of the service member to meet his/her obligation is or has been materially affected by reason of his military service.<sup>43</sup>

Courts have exercised their equitable powers in a variety of ways. In a case where the court found that a service member's ability to comply had been materially affected by his military service, but any delay in enforcement would impose an "unnecessary, unexpected and unjustifiable hardship" on the creditor, "without bringing any benefit" to the service member, the court refused to grant a stay and resorted to its equitable powers to resolve the dilemma. Because the value of the security exceeded the amount due under the contract, the property was ordered sold, thereby terminating the service member's liability while the creditor received the balance due on the contract.<sup>44</sup> In another case in which the security for the obligation would have been destroyed or so diminished in value as to render it useless, the court ordered it sold and the proceeds divided proportionately.<sup>45</sup>

*e. Material effect.* In determining whether military service materially affects a service member's ability to meet his/her obligations, the court may compare his/her financial condition prior to entry on active duty with his/her condition while in military service.<sup>46</sup> Thus, where it was shown that the plaintiff had defaulted prior to entry into military service, and that he/she earned more money while in the military service than as a civilian, the court properly refused to stay the proceedings, holding that the plaintiff failed to prove that his service in the Navy impaired his/her ability to meet obligations.<sup>47</sup>

Another factor that courts have considered is when the default or noncompliance by the service member began. When a pattern of noncompliance was begun long before the debtor's induction into the service, it supported the court's belief that military service was not the cause of the debtor's inability

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<sup>42</sup>Nassau Sav. & Loan Assoc. v. Ormond, 179 Misc. 447, 39 N.Y.S.2d 92.

<sup>43</sup>The grammatical construction of this section indicates that the "material effect" clause in section 301(3) modifies the first and second types of relief only. The cases that have granted other equitable relief, however, have also required some showing that the service member's ability to comply is or has been materially affected by his military service. See *Boone v. Lightner*, 319 U.S. 561, *reh'g denied*, 320 U.S. 809 (1943); *Federal Nat. Mortgage Ass'n. v. Denziel*, 136 F. Supp. 859 (E.D. Mich. 1956); *New York Life Ins. Co. v. Litke*, 180 Misc. 297, 41 N.Y.S.2d 526 (Sup. Ct. 1943) *modified* on other grounds, 181 Misc. 32, 45 N.Y.S.2d 576 (Sup. Ct. 1943). But see *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (In an action in which damages were sought for wrongful repossession of plaintiff's car, without filing a lawsuit, while he was in military service, plaintiff was not required to prove inability to pay occasioned by his military service).

<sup>44</sup>Associates Discount Corp. v. Armstrong, 33 N.Y.S.2d 36 (Rochester City Ct. 1942).

<sup>45</sup>Holtzman's Furniture Store v. Schrapp, 30 So.2d 450 (La. App. 1949).

<sup>46</sup>Brown Service Ins. Co. v. King, 247 Ala. 311, 24 So.2d 219 (1945).

<sup>47</sup>Harvey v. Home Owners' Loan Corp., 189 Misc. 73, 67 N.Y.S.2d 586 (1946).

to meet the obligation.<sup>48</sup> Consequently, the service member seeking relief under this section must show hardship or material effect before he/she is entitled to protection under this section of the Act.

*f. Criminal sanctions.* As in other sections of the Act, subsection 301(2) provides that anyone who knowingly resumes possession of property that is subject to this section without taking the action required by subsection (1), or attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned, not to exceed one year, or both.

#### **4-4. Mortgage Foreclosures**

##### **Section 302**

(50 U.S.C. App. § 532)

(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still owned by him which obligations originated prior to such person's period of military service.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service--

(a) stay the proceedings as provided in this Act; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107 [App. § 517], unless upon order previously granted by the court and a return thereto made and approved by the court.

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<sup>48</sup>See *Creamer v. Ansoplano*, 183 Misc. 716, 52 N.Y.S.2d 862 (Sup. Ct. 1945); *Reese v. Bacon*, 176 S.W.2d 971 (Tex. Civ. App. 1944).

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(4) Any person who shall knowingly make or cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, or attempts so to do, shall be fined as provided in title 18, United States Code, or imprisoned not to exceed one year, or both.

*a. General.* This section contains language similar to section 301 and attempts to accomplish similar results. Section 302, however, is specifically designed to protect service members against foreclosure of mortgages and other security instruments. The essential difference between these two sections is that section 302 requires a secured obligation, whereas section 301 does not require a security interest in the property. Section 302 requires the secured creditor to seek a court order authorizing foreclosure.<sup>49</sup>

*b. Application.* Relief under section 302 is available to service members and, pursuant to section 306 (50 U.S.C. App. § 536), to their dependents. Subsection (1) clearly defines the obligations to which section 302 applies. In order to come within the provisions of this section, the service member (or dependent) must establish the following:

(1) That relief is sought on an obligation secured by (a) mortgage, (b) trust deed or (c) other security in the nature of a mortgage on either real or personal property;

(2) That the obligation originated prior to his/her entry into military service;

(3) That the property was owned by him/her or his/her dependent prior to the commencement of military service; and

(4) That the property is still owned by the service member or his/her dependent at the time relief is sought.<sup>50</sup>

*c. Action in court.* Subsection (3) of section 302 prohibits the foreclosure and sale of mortgaged property in the absence of an agreement executed subsequent to the service member's receipt of notice of induction,<sup>51</sup> or in the absence of a court order, regardless of any contractual

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<sup>49</sup> Major James Pottorff, Note, *Protection from Mortgage Foreclosure*, The Army Lawyer, December 1990, at 45; and Ron Galperin, *Law Can Protect Military Personnel from Foreclosure*, Los Angeles Times, August 8, 1995, at [Business Section] 8.

<sup>50</sup> *Meyers v. Schmidt*, 181 Misc. 589, 46 N.Y.S.2d 420 (Sup. Ct. 1944). See also *Tucson Telco Fed. Credit Union v. Bowser*, 9 Ariz. App. 242, 451 P.2d 322 (1969) (obligation of adult single woman evidenced by note and chattel mortgage executed solely by her, encumbering automobile owned by her, incurred eight months prior to her marriage to a civilian, who one year later was inducted into the Armed Forces, which obligation was paid entirely from earnings from maker until repossession of automobile, was obligation entitled to protection of provisions of sections 300-306 of the Act).

<sup>51</sup> SSCRA § 107.

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provisions.<sup>52</sup> A foreclosure in violation of subsection (3) may render the action voidable, and might also subject the mortgagee or trustee to criminal prosecution.<sup>53</sup>

The requirement for a court order prior to foreclosure and sale of mortgaged property is contained in the clause, "unless upon an order previously granted by the court. . . ." Two courts construing this clause have differed as to exactly when the order must have been previously granted. A New Jersey court held that the order must have been granted prior to the service member's entry on active duty.<sup>54</sup> A New York court, however, held that this clause means that the order must have been granted prior to foreclosure and not prior to the service member's entry on active duty.<sup>55</sup> The New York rule appears to be the correct rule, in view of the language of section 302(2): "In any proceedings commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service. . . ." The New Jersey rule could not reasonably be applied to a breach which occurred after the mortgagor's entry upon active duty. In a Texas case, the 5th Circuit held that a sale at a bank-organized auction of mortgaged property by an agent of the service member was not within the confines of this section absent evidence that the agent of the service person was also the agent of the bank.<sup>56</sup>

*d. Nature of ownership.* The Act requires the service member (or his/her dependent) to have "owned" the mortgaged property prior to his/her entry upon active duty, continuing up to the time relief is sought from the court. Several questions relating to the nature of the ownership required to bring an obligation within the Act's coverage have been litigated.

Generally, the courts have interpreted the word "owned" to mean equitable and legal interests in property. This was the usage given under the Act of 1918<sup>57</sup> and the same meaning has been applied to the present Act.<sup>58</sup> While the weight of authority supports this proposition, difficulties arise when innocent third parties who are purchasers for value without notice are involved. In these instances, the

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<sup>52</sup>Hoffman v. Charlestown Five Cents Sav. Bank, 231 Mass. 324, 121 N.E. 15 (1918).

<sup>53</sup>SSCRA § 302(4).

<sup>54</sup>Stability Building and Loan Ass'n v. Liebowitz, 132 N.J. Eq. 477, 28 A.2d 653 (1942).

<sup>55</sup>Syracuse Sav. Bank v. Brown, 181 Misc. 999, 42 N.Y.S.2d 156 (Sup. Ct. 1943).

<sup>56</sup>Engstrom v. First Nat'l Bank, 47 F.3d 1459, 1461-64 (5th Cir., 1995).

<sup>57</sup>Morse v. Stober, 233 Mass. 223, 123 N.E. 780 (1919); Hoffman v. Charlestown Five Cent Savings Bank, 231 Mass. 324, 121 N.E. 15 (1918).

<sup>58</sup>Fourth Nat'l Bank in Wichita v. Hill, 181 Kan. 683, 314 P.2d 312 (1957); Guleserian v. Pilgrim Trust Co., 331 Mass. 431, 120 N.E.2d 193 (1954); Twitchell v. Home Owners' Loan Corp., 59 Ariz. 22, 122 P.2d 210 (1942).

courts avoid exercising their equitable powers in favor of the service member by stating that "equitable" title must be recorded.<sup>59</sup>

*e. Material effect.* A mortgagee bringing a foreclosure action will provide the court with proof of the existence and the extent of the mortgage debt upon which suit is instituted and the date of default in payment. If favorable to him/her the mortgagee will often present the mortgagor's pre-service payment record. This is done when the record demonstrates pre-service default or a continuous pattern of tardy payments.<sup>60</sup>

Having determined that the service member "owned" the property as required by section 302(1), the trial court must then form an opinion on the ability of the service member to meet his/her financial obligations. That is, the court must determine whether military service has materially affected the service member's ability to discharge his/her pre-service responsibilities in the manner agreed upon. As one court has stated, "[t]he criteria, then, is a combination of two factors, *i.e.*, (1) whether the defendant's inability to comply results by reason of such military service, and (2) that such military service has materially affected the ability to comply."<sup>61</sup>

To secure relief under section 302, the service member should provide the court with sufficient financial information on the material effect of military service.<sup>62</sup> Two pieces of financial information are always essential: pre-service income and in-service income. Pre-service income, out of which the agreed mortgage payments were previously paid on time,<sup>63</sup> is considered as a standard. In-service income must not only be smaller, but it must be insufficient to reasonably maintain the service member before a court will grant relief.<sup>64</sup> Proof of in-service income should include showing the amount of (1)

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<sup>59</sup>*See, e.g.,* Lansing v. Kremmelbein, 33 Misc.2d 899, 227 N.Y.S.2d 138 (Sup. Ct. 1962); Godwin v. Gerling, 362 Mo. 19, 239 S.W.2d 352 (1951).

<sup>60</sup>Franklin Soc. for Home-Building & Sav. v. Flavin, 265 App. Div. 720, 40 N.Y.S.2d 582 (1943), *aff'd*, 291 N.Y. 530, 50 N.E.2d 653, *cert. denied*, 320 U.S. 786 (1944).

<sup>61</sup>Hunt v. Jacobson, 178 Misc. 201, 204, 33 N.Y.S.2d 661, 664 (Sup. Ct. 1942). *See generally* Karen H. Switzer, *Mortgage Defaults and the Soldiers' and Sailors' Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test*, 18 REAL EST. L.J. 171, 177-184 (1989).

<sup>62</sup>The Act does not state which party has the burden of proof. The Supreme Court in Boone v. Lightner, 319 U.S. 561 (1943), ruled that the burden of going forward would be determined by the trial courts. In some cases, the service member was required to prove material effect, *e.g.*, Queens County Sav. Bank v. Thaler, 181 Misc. 229, 44 N.Y.S.2d 4 (Sup. Ct. 1943); whereas in other cases the one bringing the action against a service member had the burden of proving lack of material effect, *e.g.*, Meyers v. Schmidt, 181 Misc. 589, 46 N.Y.S.2d 420. In any event, the service member should be prepared to go forward with sufficient evidence to support his position.

<sup>63</sup>"While promptness in the payment of a bill may indicate ability to pay, the failure to be prompt in the payment of bills does not necessarily indicate inability to pay." Meyers v. Schmidt, 181 Misc. at 592, 46 N.Y.S.2d at 423.

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military pay and allowances, (2) allotments to dependents, and (3) any other nonmilitary income, even if earned by dependents. In-service income should be treated as a net amount, because proof of any additional expense caused by military service is proper. When material effect is found, the courts exercise their discretion in fashioning appropriate relief.<sup>65</sup>

*f. Nature of relief.* In a mortgage foreclosure proceeding, the Act generally provides the service member with three types of relief, which, under proper circumstances, are as follows:

(1) A stay of the proceedings, or an extension of the maturity dates of his/her obligations by way of diminished payments;

(2) Where foreclosure judgment has already been ordered, a reopening or setting aside of the judgment in order that the reviewer may assert a defense;<sup>66</sup> and

(3) Where a sale has been had under a judgment of foreclosure, invocation of the statutory redemption period, extended by a period equal to his/her military service.<sup>67</sup>

The extent of the mortgagor's financial disability resulting from military service heavily influences a court's decision on the measure of relief to be granted. Courts attempt to make equitable disposition of individual cases on their particular facts, in an effort "to conserve the interests of all parties." This effort frequently results in granting the mortgagor, in appropriate cases, some form of conditional relief.<sup>68</sup>

(..continued)

<sup>64</sup>Hempstead Bank v. Collier, 289 N.Y.S.2d 797 (Sup. Ct. 1967).

<sup>65</sup>See, e.g., Brown Serv. Ins. Co. v. King, 247 Ala. 311, 24 So.2d 219 (1945).

<sup>66</sup>The case should be examined, in the event of a default judgment, to determine whether there was either a false affidavit or a failure to file an affidavit as is required by section 200. Such a defect may affect the validity of the judgment obtained. Wilkin v. Shell Oil Co., 197 F.2d 42 (10th Cir. 1951); *cert. denied*, 344 U.S. 854; *reh'g denied*, 344 U.S. 888.

<sup>67</sup>See SSCRA § 205; e.g., Illinois Nat'l Bank of Springfield v. Gwinn, 348 Ill. App. 9, 107 N.E.2d 764 (1952); Radich v. Bloomberg, 140 N.J. Eq. 289, 54 A.2d 249 (1947); Flagg v. Sun Inv. & Loan Corp., 373 P.2d 226 (Okla. 1962).

<sup>68</sup>A court's examination of the service member's true financial situation may be the only protection for the lender, even in cases where the soldier obtained a mortgage after commencing active service. SSCRA § 517 allows foreclosure of such obligations, but makes no provision in cases where foreclosure requires judicial action (as in bankruptcy cases). Such judicial action could justify a stay under SSCRA § 521. For a discussion of this problem, see Bruce H. White and William L. Medford, *The Soldiers' and Sailors' Civil Relief Act-Are You Stayed from Obtaining Relief from the Automatic Stay?*, 18-MAR Am. Bankr.Inst.J. 23, March, 1999.

Conditional relief usually constitutes a stay of the foreclosure proceedings on condition that the mortgagor makes some partial periodic payment on the outstanding mortgage debt.<sup>69</sup> In its discretion, the court determines to which of the incidents of the debt the payment will be applied. Although section 302 prescribes no priority of application, a pattern has emerged from the cases. Usually, payments are applied in the following order: current and accrued taxes; hazard insurance; interest on the debt; and principal. Arrearages and FHA mortgage insurance premiums have been inserted in the priority scale in various fashions. So also have the application of sums from casualty insurance recoveries, amounts held in escrow by the mortgagee, and property surpluses.<sup>70</sup> Sometimes, when a court has granted a stay and ordered partial payments, the court has also required the service member to make periodic sworn statements of his/her financial condition either to the court or to the mortgagee.<sup>71</sup> Conditional stay orders occasionally grant a mortgagee the right to apply for an amended stay order if the mortgagor's ability to discharge his/her debt becomes less impaired.<sup>72</sup> Such an amendment is within the court's power as a matter within its equitable powers and its continuing jurisdiction over the case.

#### **4-5. Anticipatory, Applied for Relief**

##### Section 700

(50 U.S.C. App. § 590)

(1) A person may, at any time during his period of military service or within six months thereafter, apply to a court for relief in respect of any obligation or liability incurred by such person prior to his period of military service or in respect of any tax or assessment whether falling due prior to or during his period of military service. The court, after appropriate notice and hearing, unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability or to pay such tax or assessment has not been materially affected by reason of his military service, may grant the following relief:

(a) In the case of an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, a stay of the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application

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<sup>69</sup>*See, e.g.,* Federal Nat'l Mortgage Ass'n v. Deziel, 136 F. Supp. 859.

<sup>70</sup>*See* Brown Serv. Ins. Co. v. King, 247 Ala. 311, 24 So.2d 219; Railroad Fed. Sav. & Loan Ass'n v. Morrison, 179 Misc. 893, 40 N.Y.S.2d 319 (Sup. Ct. 1943); Nassau Sav. & Loan Ass'n v. Ormond, 179 Misc. 447, 39 N.Y.S.2d 92.

<sup>71</sup>New York Life Ins. Co. v. Litke, 180 Misc. 297, 41 N.Y.S.2d 526, *modified on other grounds*, 181 Misc. 32, 45 N.Y.S.2d 576.

<sup>72</sup>*See, e.g.,* O'Leary v. Horgan, 179 Misc. 518, 39 N.Y.S.2d 555 (1943).

if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant, or any part of such combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service or from the date of application, as the case may be, in equal installments during such combined period at such rate of interest on the unpaid balance as is prescribed in such contract, or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just.

(b) In the case of any other obligation, liability, tax, or assessment, a stay of the enforcement thereof during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period of time equal to the period of military service of the applicant or any part of such period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of such period of military service or the date of application, as the case may be, in equal periodic installments during such extended period at such rate of interest as may be prescribed for such obligation, liability, tax or assessment, if paid when due, and subject to such other terms as may be just.

(2) When any court has granted a stay as provided in this section no fine or penalty shall accrue during the period the terms and conditions of such stay are complied with by reason of failure to comply with the terms or conditions of the obligation, liability, tax, or assessment in respect of which such stay was granted.

*a. General.* This section is similar to sections 301 and 302. It provides a means by which a person in military service may orderly liquidate obligations and liabilities affected by that service. The essential difference is that section 700 permits the service member to initiate the action instead of waiting for the creditor to commence proceedings.<sup>73</sup> Dependents do not have independent protection under this section, as they do for Article III protection.<sup>74</sup>

A court may suspend enforcement of all or any portion of any obligation or liability that arose prior to entry on active duty, or any tax or assessment falling due either before or during service. To obtain relief, the service member must apply to the court during his/her military service, or within six months thereafter, and satisfy the court that his/her ability to meet his/her obligations are materially affected by his/her service.

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<sup>73</sup>Kindy v. Koenke, 216 F.2d 907 (8th Cir. 1954). Major Mary Hostetter, *Using the Soldiers' and Sailors' Civil Relief Act to Your Clients' Advantage*, The Army Lawyer, December 1993, at 40; and Switzer, *supra* note 61, at 176-177.

<sup>74</sup>Morris Plan Indus. Bank of N.Y. v. Petluck, 60 N.Y.2d 162 (1946).



*b. Application.* This section includes all contracts and mortgages covered by sections 301 and 302 plus any other obligation or liability incurred prior to entry on active duty or any tax or assessment regardless of when the tax or assessment falls due. This section differs from sections 301 and 302 as follows:

- (1) The service member is permitted to institute the action for a stay of the enforcement of his/her obligations;
- (2) The service member may apply for relief even if he/she is not in default on the obligation;
- (3) The stay under this section may be for a longer period of time than under other sections of the Act.
- (4) For the purposes of relief, the section is divided into two categories:
  - (a) obligations incurred for the purchase of real estate or secured by a mortgage or other security in the nature of a mortgage of real estate, and
  - (b) all other obligations, liabilities, taxes, or assessments.

*c. Action in court.* To obtain relief under this section, the service member is required to apply to the court in accordance with subsection (1). No court, as yet, has granted relief on its own motion under the provisions of this section.

The question of whether or not a service member is entitled to a stay where there is no default and no action pending was raised in *Application of Marks*.<sup>75</sup> The court decided that no action need be pending and the service member need not be in default. Additionally, a service member is not prohibited from applying for relief after action has been brought or a stay been granted under the provisions of sections 301 or 302.<sup>76</sup>

*d. Nature of relief.* Once the court is satisfied that the service member's ability to meet his/her obligations is materially affected<sup>77</sup> by his/her service, it has authority not only to stay the enforcement of the obligation, but also to set up an equitable plan or schedule for him/her to repay the debts he/she is unable to handle because of military service.

The stay provisions of this section provide that if the obligation involved is for the purchase of real estate or is secured by real estate, the court may grant a stay to allow the service member to

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<sup>75</sup>181 Misc. 497, 46 N.Y.S.2d 755 (Sup. Ct. 1944).

<sup>76</sup>New York Life Ins. Co. v. Litke, 180 Misc. 297, 41 N.Y.S.2d 526, *modified on other grounds*, 181 Misc. 32, 45 N.Y.S.2d 576.

<sup>77</sup>See para. 4.43., *supra*, for a discussion of material affect.

suspend all payments while in service. The service member may then make up these back payments, plus interest, by spreading them out equally over the remaining life of the contract, plus a period of time equal to his/her time in service. For all other debts, the time allowable to make up the back payments cannot exceed a period of time equal to his/her time in service.

An example provides the best explanation of these provisions. Assume that when A enters the service, he owns a mortgaged house with 20 years remaining on the mortgage, and a boat with 5 years of installment payments remaining. While spending two years on active duty, he made reduced payments on both obligations by obtaining a stay under this section. When he is separated from the service, he has 18 more years on his mortgage and is \$1400.00 in arrears. He also has three years of payments remaining on his boat and is \$800.00 in arrears on this debt. The court may allow the \$1400.00 to be spread out for a period of 20 years and the \$800.00 for a period of two years. The maximum permissible period for the stay on the mortgage is calculated by adding the 18 years remaining on the mortgage at the time of separation to the two years A spent in the service. As to the installment contract on the boat, A could be permitted a maximum of 2 years to make up the arrears since the court is allowed to grant a stay equal to his term of service.

In addition, the discharged service member will be required to resume his regular payments at the same time he is paying the arrears. The stay described in the example is the maximum allowable stay. The court could order less time for repayment, in accordance with its equitable powers.<sup>78</sup>

This provision is very useful in dealing with auto lease problems. For example, a Reserve physician has a pre-service BMW auto lease that he cannot afford upon activation. He voluntarily surrenders the vehicle back to the lease-holder. After he returns from active duty, the lease-holder sues him for the deficiency payment left on the vehicle of several thousand dollars. How could the soldier have prevented the deficiency problem? One option could have been to use \$590 to get prospective relief from his lease payments, prior to any default. Of course, upon his return, the discharged soldier must pay all back payments due during the period of time equal to the time in active service, and he must continue to make his regular payments, without incurring any early termination penalties.

#### **4-6. Personal Property Repossession Appraisals**

##### **Section 303**

(50 U.S.C. App. § 533)

Where a proceeding to foreclose a mortgage upon or to resume possession of personal property, or to rescind or terminate a contract for the purchase thereof, has been stayed as provided in this Act, the court may, unless in its opinion an undue hardship would result to the dependents of the person in military service, appoint three disinterested parties to appraise the property and, based upon the report of the appraisers, order such sum, if any, as may be just, paid to the person in military service

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<sup>78</sup>See, e.g., *Application of Pickard*, 187 Misc. 400, 60 N.Y.S.2d 506 (1946); *Morris Plan Indus. Bank of N.Y. v. Petluck*, 187 Misc. 87, 60 N.Y.S.2d 162 (1946).

or his dependent, as the case may be, as a condition of foreclosing the mortgage, resuming possession of the property, or rescinding or terminating the contract.

*a. General.* This section is designed to provide supplemental relief for all parties when an installment contract or other obligation for the purchase of personal property has been stayed under other sections of the Act.

*b. Application.* Section 303 is applicable in cases where a stay has been granted under this Act in any proceeding to "foreclose a mortgage upon or to resume possession of personal property, or to rescind or terminate a contract for the purchase thereof." In such a case, the trial court is empowered to appoint three appraisers to determine the value of the personal property involved. Based on the appraised value, the court may order whatever sum, if any, it believes is representative of the service member's equity to be paid to the service member or his/her dependent. This payment may be made a condition precedent to foreclosing the mortgage, terminating the contract, or permitting the vendor to resume possession of the chattel. This section has been effectively employed in the situation where the value of the pledged chattel is "rapidly diminishing."<sup>79</sup>

When applying section 303, the trial court is faced with the task of striking a delicate balance of the equities between (1) the service member, in whose favor a ruling previously has been made by way of a stay or proceedings; (2) the dependent of the service member, who should not be subjected to undue hardship as a result of losing use of the chattel; and (3) the vendor, who has neither been paid nor has the benefit of the possession of the chattel.

The sole restriction against the court's use of this section is embodied in the clause "unless in its opinion an undue hardship would result to the dependents of the person in the military service." "Undue hardship" is difficult to define. Therefore, the courts have considered it a factual determination that must be made on a case by case basis.<sup>80</sup>

#### **4-7. Termination of Leases by Lessees**

##### **Section 304**

(50 U.S.C. App. § 534)

(1) The provisions of this section shall apply to any lease covering premises occupied for dwelling, professional, business, agricultural, or similar purposes in any case in which (a) such lease was executed by or on the behalf of a person who, after the

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<sup>79</sup>See *S & C Motors v. Carden*, 223 Ark. 164, 264 S.W.2d 627 (1954); and *Associates Discount Corp. v. Armstrong*, 33 N.Y.S.2d 36 (Rochester City, Ct. 1942).

<sup>80</sup>*Commercial Sec. Co. v. Kavanaugh*, 13 So.2d 533 (La. App., 1943). This case also contains an excellent discussion of the reasons for the 1942 amendment to this section. For two cases applying this section prior to the 1942 amendment, see *Price v. Phillips*, 12 So.2d 59 (La. App. 1942); *National Bond & Investment Co. v. Christner*, 24 Westmoreland County, L.J. (C.P. 1942).

execution of such lease, entered military service, and (b) the premises so leased have been occupied for such purposes, or for a combination of such purposes, by such person or by him and his dependents.

(2) Any such lease may be terminated by notice in writing delivered to the lessor (or his grantee) or to the lessor's (or his grantee's) agent by the lessee at any time following the date of the beginning of his period of military service. Delivery of such notice may be accomplished by placing it in an envelope properly stamped and duly addressed to the lessor (or his grantee) or to the lessor's (or his grantee's) agent and depositing the notice in the United States mails. Termination of any such lease providing for monthly payment of rent shall not be effective until thirty days after the first date on which the next rental payment is due and payable subsequent to the date when such notice is delivered or mailed. In the case of all other leases, termination shall be effected on the last day of the month following the month in which such notice is delivered or mailed and in such case any unpaid rental for a period preceding termination shall be proratably computed and any rental paid in advance for a period succeeding termination shall be refunded by the lessor (or his assignee). Upon application by the lessor to the appropriate court prior to the termination period provided for in the notice, any relief granted in this subsection shall be subject to such modifications or restrictions as in the opinion of the court justice and equity may in the circumstances require.

(3) Any person who shall knowingly seize, hold, or detain the personal effects, clothing, furniture, or other property of any person who has lawfully terminated a lease covered by this section, or in any manner interfere with the removal of such property from the premises covered by such lease, for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempts so to do, shall be fined as provided in title 18, United States Code, or imprisoned not to exceed one year, or both.

*a. General.* This section of the Act differs from section 300 dealing with eviction in that it provides a method by which the service member-lessee [or his or her dependents in their own right (see ? 536)],<sup>81</sup> rather than the lessor, may terminate a lease. Its scope is not limited, as is section 300, by either the amount of the agreed rent or the nature of the premises. Section 304 is, however, limited in

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<sup>81</sup>If a pre-service lease was signed only by non-military spouse, could he or she terminate the lease? Yes. Dependents have protection in their own right even though § 534 says the lease must be executed **by or on behalf of the service member....** (use § 536 to insert "by or on behalf of the **dependent.**" What if the non-military person signed the lease before marrying a person who enters military service.... could the non-military spouse terminate the lease? Yes. See, Tucson Telco Fed. Credit Union v. Bowser, 451 P.2d 322 (Ariz. Ct. App. 1969) (single woman entered chattel mortgage on car, was subsequently married to civilian who was later drafted; car registered solely in her name and she alone made payments before repossession; court held that repossession without court order violated § 532, SSCRA. SSCRA applied because her ability to pay was impaired by husband's subsequent induction).

application to premises occupied *prior to*<sup>82</sup> entry into military service. In further contrast to section 300, this section does not require that the lessee's ability to perform be materially affected by his/her military service.

*b. Application.* The termination provisions of this section apply to any lease covering premises occupied for dwelling, professional, business, agricultural or similar purposes, if the following two conditions are met:

(1) The lease was executed by a person who, after the execution of such lease, entered military service;<sup>83</sup> and

(2) The leased premises have been occupied for such purposes by the service member or his/her dependents.

What if the pre-service lease was signed not by the service member, but by the nonmilitary spouse, could he or she terminate the lease? Generally, yes.<sup>84</sup>

What if the nonmilitary spouse signed the pre-service lease before marrying the service member; can he or she terminate the lease? Generally, yes.<sup>85</sup>

What if the service member or spouse signs the lease *after* entering active service; may they terminate the lease under § 534? No. Leases entered *after* coming on active duty may not be terminated under the SSCRA lease termination provision.<sup>86</sup> Military tenants are advised to consult military legal assistance attorneys or housing officers prior to signing a lease to determine if the state where the lease is being signed has a statutory "military clause" allowing lease termination because of military orders or necessity.<sup>87</sup> Where a state does not have a statutory "military clause", the tenants should negotiate with the landlord to include one in their lease agreement prior to signing the lease.<sup>88</sup>

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<sup>82</sup>This is emphasized because most service members have the mistaken belief that this section applies to leases entered into after entry on active duty.

<sup>83</sup>In re Erlich v. Landman, 179 Misc. 972, 40 N.Y.S.2d 743 (Sup. Ct. 1943), *appeal denied*, 266 App. Div. 941, 46 N.Y.S.2d 219 (Sup. Ct. 1943) (the fact that the lessee's son, for whom the lessee leased the premises, went into the Army did not entitle lessee to relief under this section).

<sup>84</sup> 50 U.S.C. App. § 536 (1994).

<sup>85</sup> Tuscon Telco Fed. Credit Union v. Bowser, 451 P.2d 322 (Ariz. Ct. App. 1969).

<sup>86</sup> 50 U.S.C. App. § 534 (1) (a)(1994).

<sup>87</sup> Hostetter, *supra* note 72 and accompanying text, at 41 n.65.

<sup>88</sup> *Ibid.*

c. *Procedural requirements.* The lessee must deliver written notice of termination to the lessor at any time after entry on active duty or receipt of orders as contemplated by section 106.<sup>89</sup> Delivery may be made by posting a properly addressed and stamped envelope in the U.S. mails. Oral notice to the lessor is insufficient.<sup>90</sup> In addition, among partners in an enterprise, notice from one partner to the others that the service person intends to vacate the premises is insufficient to notify the landlord.<sup>91</sup>

The effective date of the termination is determined by the method of rental payment under the lease. In the case of a month to month rental, the termination becomes effective 30 days after the first date on which the next rental payment is due subsequent to the date when the notice of termination is delivered. For example, if the rent is due on the first day of each month, and notice is mailed on 1 August, then the "next rental payment is due and payable" on 1 September. Thirty days after that date would be 1 October, the effective date of termination.

All other leases will be terminated on the last day of the month following the month in which proper notice is delivered. For example, if the lease requires a weekly or yearly rental and proper notice of termination is given on 20 July, the effective date of termination would be 31 August.

d. *Return of security or prepaid rent.* The service member is required to pay rent for only those months before the lease is terminated.<sup>92</sup> If the service member has paid rent in advance, then section 304 requires the lessor to prorate and refund the unearned portion. If a deposit for security was required by the lessor, then, upon termination of the lease, the lessee is entitled to the deposit.<sup>93</sup>

e. *Lessor's rights.* Section 304 also extends certain rights to the lessor whose lease is terminated under these provisions. The lessor may, during the period from his/her receipt of notice to the effective date of termination, petition the appropriate court for relief from the lease termination. The court may then make such "modifications or restrictions as in the opinion of the court justice and equity may in the circumstances require."<sup>94</sup> Landlords may petition the court on grounds of "undue hardship" or countervailing equitable consideration (e.g., lack of good faith rental of the property), for an "equitable offset" for lease termination. Such an "equitable offset" would most likely be granted in commercial or professional lease terminations. "Equitable offset" could include lost rent, realty fees for

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<sup>89</sup>SSCRA § 106; *Ostrowski v. Barzynski*, 24 Erie County L.J. 221, 45 Pa. D. & C. 452 (C.P. 1942).

<sup>90</sup>SSCRA § 106; *Ostrowski v. Barzynski*, 24 Erie County L.J. 221, 45 Pa. D. & C. 452 (C.P. 1942).

<sup>91</sup>*Travers v. Rainey*, 888 P.2d 372 (Colo. Ct. App., 1995).

<sup>92</sup>*J.C.H. Serv. Stations, Inc. v. Patrikes*, 181 Misc. 401, 46 N.Y.S.2d 228 (N.Y. City Ct. 1944).

<sup>93</sup>*Patrikes v. J.C.H. Serv. Stations, Inc.*, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. City Ct.), *aff'd*, 180 Misc. 927, 46 N.Y.S.2d 233 (Sup. Ct. 1943).

<sup>94</sup>*Bal Harbour Tower, Inc. v. Keller*, 227 So.2d 219 (Fla. App. 1969). *See also* Major Paul Conrad, Note, *Preservice Lease Terminations May Be Subject to Landlord "Equitable Offsets"*, *The Army Lawyer*, April 1997, at 153.

re-rental, depreciation in rental value of premises because of tenant-requested fixtures, and attorney fees and costs.<sup>95</sup> In addition, if the service person requires the lessor to modify the property and subsequently terminates the lease, the lessor may charge the lessee for the alterations. This occurs only if the lessee knew of the impending call to active duty at the time the lessee requested the modifications.<sup>96</sup>

*f. Landlord Seizure of Personal Property.* If the lessor seizes or attempts to seize the personal property of the lessee for the purpose of subjecting the property to a claim for rent accruing after the effective date of termination, however, he may be punished under subsection (3).<sup>97</sup>

#### **4-8. Rights of Life Insurance Assignees; Enforcement of Storage Liens**

##### **Section 305**

(50 U.S.C. App. § 535)

(1) Where any life insurance policy on the life of a person in military service has been assigned prior to such person's period of military service to secure the payment of any obligation of such person, no assignee of any policy (except the insurer in connection with a policy loan) shall, during the period of military service of the insured or within one year thereafter, except upon the consent in writing of the insured made during such period or when the premiums thereon are due and unpaid or upon the death of the insured, exercise any right or option by virtue of such assignment unless upon leave of court granted upon an application made therefor by such assignee. The court may thereupon refuse to grant such leave unless in the opinion of the court the ability of the obligor to comply with the terms of the obligation is not materially affected by reason of his military service. For the purpose of this subsection premiums which are guaranteed under the provisions of article IV of this Act shall not be deemed to be due and unpaid.

(2) No person shall exercise any right to foreclose or enforce any lien for storage of household goods, furniture, or personal effects of a person in military service during such person's period of military service and for 3 months thereafter, except upon an order previously granted by a court upon application therefor and a return thereto made and approved by the court. In such proceeding the court may, after hearing, in its

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<sup>95</sup> *Omega v. Raffaele*, 894 F. Supp. 1425 (D. Nev., 1995). The reasoning of the *Raffaele* court ignores the legislative history of the Act which does not support an "equitable offset" for lost rent or realtor's fees, but would support a claim for loss of value.

<sup>96</sup> *Id.*

<sup>97</sup> Personal property has been defined as including personal effects, clothing, or furniture and was extended to include a money deposit. *Patrikes v. J.C.H. Serv. Stations, Inc.*, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. City Ct.), *aff'd*, 180 Misc. 927, 46 N.Y.S.2d 233.

discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to pay the storage charges due is not materially affected by reason of his military service--

- (a) stay the proceedings as provided in this Act, or
  - (b) make such other disposition of the case as may be equitable to conserve the interest of all parties. The enactment of the provisions of this subsection shall not be construed in any way as affecting or as limiting the scope of section 302 of this Act.
- (3) Any person who shall knowingly take any action contrary to the provisions of this section, or attempts so to do, shall be fined as provided in title 18, United States Code, or imprisoned not to exceed one year, or both.

*a. Life insurance.* Subsection (1) is designed to govern the situation where, prior to entry into military service, an insured has assigned his/her life insurance policy as collateral for a loan. After entry on active duty, this section prohibits the assignee from exercising any right or option under the assignment of the policy except in the following circumstances:

- (1) Where written consent is made by the insured after entry into military service; or
- (2) When the premiums on the policy due are unpaid;<sup>98</sup> or
- (3) When the insured dies; or
- (4) Upon leave of court granted upon an application made therefor by the assignee.

The purpose of this section is to require creditors holding life insurance policies as collateral to obtain court approval before attaching the proceeds of the policy.

*b. Storage liens.* Subsection (2) pertains to the foreclosure of liens for storage of household goods or other personal property of military personnel, whether the goods were stored prior to entry upon active duty or not. Such foreclosure is prohibited during the period of military service and for three months thereafter, unless the lienholder obtains an order from a court and a return is made and approved by the court.<sup>99</sup> Criminal penalties for violation are provided.<sup>100</sup>

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<sup>98</sup>Under the express language of this section, premiums that are guaranteed under the provisions of Article IV of this Act shall not be deemed to be due and unpaid.

<sup>99</sup>See para. 4.3c, *supra*, for a discussion of court order and a return thereto.



## *Chapter 4 - Rents, Mortgages, Foreclosures*

Congress included this section to ensure judicial safeguards in all foreclosure proceedings and to avoid the possibility that summary foreclosures allowed by some states would be held without the protections of section 302.<sup>101</sup>

(..continued)

<sup>100</sup>*See* United States v. Bomar, 8 F.3d 226 (5th Cir. 1993). (United States prosecuted criminally this case on behalf of the soldier. Garageman violated SSCRA by enforcing and attempting to enforce, without seeking court approval, lien for storage of vehicle owned by soldier. The court stated that the Act does not require that lien be solely for "storage," rather, "any lien for storage" includes a mechanics lien in this case. To fall within the Act, a lien must include charges for storage, but the lien need not be limited to such fees. A service member's car repair mechanic's lien may be within Act's coverage).

<sup>101</sup>This section specifically states that it shall not affect or limit the scope of section 302.

## **Chapter 5**

### **Insurance**

#### **5-1. Purpose and Scope**

The purpose of this chapter is to discuss Article IV, section 400 through 407<sup>1</sup> [50 U.S.C. App. §§ 540-547], of the Soldiers' and Sailors' Civil Relief Act. These sections provide a means by which a service member may have the U.S. Office of Veterans Affairs guarantee payment of premiums on certain types of commercial life insurance contracts. Relatively few service members have applied for benefits under these sections, probably because the law merely provides a moratorium on premiums and does not relieve the service member from liability for repayment of the premiums. The 1991 amendments concerning professional liability insurance, Article VII § 702 [50 U.S.C. App. § 592] and reinstatement of health insurance, Article VII § 703 [50 U.S.C. App. § 593] also will be discussed.

#### **5-2. Article IV, Sections 400-407**

*a. General.* The sections in Article IV are designed to provide a means by which any person entering the armed services may apply for continued protection by commercial life insurance.<sup>2</sup> Upon proper application, a service member may have the premiums and interest for certain types of commercial life insurance guaranteed for his/her period of military service and for two years thereafter.<sup>3</sup>

The Secretary of Veterans Affairs<sup>4</sup> is charged with supervising the implementation of these sections. Section 407 authorizes and directs the Secretary of Veterans Affairs to promulgate regulations and procedures necessary to implement the provisions of sections 400 through 407. Pursuant to this authority, the administrator has prescribed regulations that may be found in volume 38 of the Code of Federal Regulations, Part 7.

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<sup>1</sup>Section 408 was repealed by the 1991 Amendments.

<sup>2</sup>The provisions of these sections are not applicable to policies of United States Government Life Insurance and National Service Life Insurance. SSCRA § 400 [50 App. U.S.C. § 540(a) (1994)]; 38 C.F.R. Parts 8 and 9 (1997). State life insurance protection may also exist. See N.Y. Military Law § 316 (McKinney 1990) (amended 1991), and Lieutenant Colonel Savitt, Note, *Legislation Affecting New York Veterans and Reservists*, The Army Lawyer, Sep. 1992, at 43.

<sup>3</sup>SSCRA § 403 [50 App. U.S.C. § 543 (1994)]; 38 C.F.R. § 7.6 (1997).

<sup>4</sup>The head of the U.S. Office of Veterans Affairs is called the Secretary of Veterans Affairs. 38 U.S.C. § 303 (1994).

*b. Application.* The provisions of the sections apply to commercial life insurance policies taken out by any person in the military service of the United States<sup>5</sup> whose life is insured under and who is the owner of such policy<sup>6</sup> The policy must be in force on a premium paying basis at the time the service member applies for benefits. The service member must have taken out the policy and paid one premium not less than 180 days<sup>7</sup> before the date the insured entered military service.<sup>8</sup> Also, the maximum amount of life insurance guaranteed for any one individual is \$10,000.<sup>9</sup>

Attorneys should examine policy provisions to determine eligibility. A policy containing a provision that limits or eliminates liability for death arising from or in connection with military service, or any activity that the insured may be called upon to perform in connection with his military service, is not eligible for protection under the Act.<sup>10</sup> A policy that requires the insured service member to pay an additional premium because of military service is also outside the purview of the Act.<sup>11</sup>

*c. Nature and extent of relief.* An individual entitled to the benefits of the Act may request governmental guarantee of premiums by filing Veterans Affairs Form 9-380 with his/her insurance company and forwarding a copy of the application to the U.S. Department of Veterans Affairs.<sup>12</sup> The U.S. Department of Veterans Affairs will then determine whether the policy is covered by the sections in Article IV or not.<sup>13</sup> The U.S.

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<sup>5</sup>See SSCRA § 101 [50 App. U.S.C. § 511(1) (1994)] for a definition of "person in the military service."

<sup>6</sup>SSCRA § 400 [50 App. U.S.C. § 540 (1994)]; 38 C.F.R. § 7.6 (1997).

<sup>7</sup>By Act of July 11, 1956, 70 Stat. 528, the minimum number of days a policy is required to be in effect before entry on active duty was increased from 30 to 180 days.

<sup>8</sup>SSCRA § 400.

<sup>9</sup>SSCRA § 401 [50 App. U.S.C. § 541 (1994)]; 38 C.F.R. § 7.4 (b) (1997).

<sup>10</sup>SSCRA § 400; 38 C.F.R. § 7.6 (1997). This relates only to the primary death benefit. If a provision limits or eliminates some other benefit (*e.g.*, double indemnity), the policy will still qualify. 38 C.F.R. § 7.3(a) (1997).

<sup>11</sup>SSCRA § 400; 38 C.F.R. § 7.4 (1997).

<sup>12</sup>38 C.F.R. § 7.5(a) (1997).

<sup>13</sup>SSCRA § 403 [50 App. U.S.C. § 543 (1994)].

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Department of Veterans Affairs determination is final and is not subject to review by any other official, agency,<sup>14</sup> or court.<sup>15</sup>

Unlike several other sections, such as sections 201 and 301, which require the court to find that the service member was materially affected by military service, these sections do not require a specific finding of material effect. Hence, any person in military service could apply for relief in accordance with these sections. Relief may be granted regardless of the impact of military service on the individual's ability to pay the premiums.

Once the U.S. Department of Veterans Affairs deems a policy to be covered by Article IV, the policy will not lapse, terminate, or be forfeited because of the service member's failure to make premium payments or pay any indebtedness or interest due during this period of military service or for 2 years after the expiration of such service.<sup>16</sup> During this period, the government does not pay the premiums for the service member but simply guarantees that the premiums will be paid at the end of the period.

The insured service member must repay the unpaid premiums and interest no later than 2 years after the expiration of his/her term of military service.<sup>17</sup> If he/she fails to pay these amounts by the end of this 2-year period, the amount then due is treated by the insurance company as a loan on the policy.<sup>18</sup> This assumes that the policy has a sufficient cash surrender value to cover the amount of the unpaid premiums and interest.

If the cash surrender value of the policy is less than the amount owed, the insurance company may terminate the policy and the United States will pay the insurance company the difference between the cash surrender value and the amount of the then outstanding debt.<sup>19</sup> Also, if the policy matures as a result of death or by any other means during the protected period, the insurance company is required to deduct from the amount of the settlement the unpaid premiums and interest that were guaranteed by the U.S. Department of Veterans Affairs.<sup>20</sup>

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<sup>14</sup>SSCRA § 407 [50 App. U.S.C. § 547 (1994)].

<sup>15</sup>38 U.S.C. § 511(a) (1994).

<sup>16</sup>SSCRA § 403 [50 App. U.S.C. § 543 (1994)], 38 C.F.R. § 7.6 (1997).

<sup>17</sup>SSCRA § 406 [50 App. U.S.C. § 546 (1994)]; 38 C.F.R. § 7.6 (1997).

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>SSCRA § 405 [50 App. U.S.C. § 545 (1994)]; 38 C.F.R. § 7.7 (1997).

If the United States is required to pay any amount to an insurance company under the provisions of Article IV, the amount paid becomes a debt due the United States by the insured. This amount may be deducted from any other amounts due the insured by the United States.<sup>21</sup> If there is no other sum of money due the insured by the United States, a civil action may be brought to recover the sum due.<sup>22</sup>

*d. Definitions.*

Section 400

(50 U.S.C. App. § 540)

As used in this article--

(a) The term "policy" shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article I of this Act [App. § 511] or which does not contain any limitation or restriction upon coverage relating to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon not less than 180 days before the date the insured entered into the military service. The provisions of this Act shall not be applicable to policies or contracts of life insurance issued under the War Risk Insurance Act, as amended, the World War Veterans Act, as amended, or the National Service Life Insurance Act of 1940, as amended.

(b) The term "premium" shall include the amount specified in the policy as the stipend to be paid by the insured at regular intervals during the period therein stated.

(c) The term "insured" shall include any person in the military service of the United States as defined in section 101, article I, of this Act, whose life is insured under and who is the owner and holder of and has an interest in a policy as above defined.

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<sup>21</sup>SSCRA § 406 [50 App. U.S.C. § 546 (1994)].

<sup>22</sup>*Id.*

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(d) The term "insurer" shall include any firm, corporation, partnership, or association chartered or authorized to engage in the insurance business and to issue a policy as above defined by the laws of a State of the United States or the United States.

*e. Persons entitled to benefits.*

### Section 401

(50 U.S.C. App. § 541)

The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Secretary of Veterans Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder. The Secretary shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Secretary. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed \$10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of \$10,000, the Secretary is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed \$10,000, and a policy which affords the best security to the Government shall be given preference.

*f. Form of application.*

### Section 402

(50 U.S.C. App. § 542)

Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Secretary of Veterans Affairs may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall furnish such report to the Secretary concerning the policy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to

such modification of the policy as may be required to give this article full force and effect with respect to such policy.

*g. Lapse of policies for nonpayment of premiums.*

Section 403

(50 U.S.C. App. § 543)

The Secretary of Veterans Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Secretary to be entitled to protection under this article shall not, subsequent to the date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest.

*h. Rights and privileges of insured.*

Section 404

(50 U.S.C. App. § 544)

No dividend or other monetary benefit under a policy shall be paid to an insured or used to purchase dividend additions while a policy is protected by the provisions of this article except with the consent and approval of the Secretary of Veterans Affairs. If such consent is not procured, such dividends or benefits shall be added to the value of the policy to be used as a credit when final settlement is made with the insurer. No cash value, loan value, or withdrawal of dividend accumulation, or unearned premium, or other value of similar character shall be available to the insured while the policy is protected under this article except upon approval by the Secretary of Veterans Affairs. The insured's right to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected by the provisions of this article.

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### *i. Settlement of policies during protection.*

#### Section 405

(50 U.S.C. App. § 545).

In the event of maturity of a policy as a death claim or otherwise before the expiration of the period of protection under the provisions of this article, the insurer in making settlement will deduct from the amount of insurance the premiums guaranteed under this article, together with interest thereon at the rate fixed in the policy for policy loans. If no rate of interest is specifically fixed in the policy, the rate shall be the rate fixed for policy loans in other policies issued by the insurer at the time the policy bought under the Act was issued. The amount deducted by reason of the protection afforded by this article shall be reported by the insurer to the Secretary of Veterans Affairs.

### *j. Guaranty of premiums and interest.*

#### Section 406

(50 U.S.C. App. § 546)

Payment of premiums and interest thereon at the rate specified in section 405 hereof becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law. Any moneys received as repayment of debts incurred under this article, as originally enacted and as amended, shall be credited to the appropriation for the payment of claims under this article.



*k. Regulations; finality of determinations.*

Section 407

(50 U.S.C. App. § 547)

The Secretary of Veterans Affairs shall provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Secretary in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government.

**5-3. Article VII, Sections 702, 703**

*a. Professional liability protection for certain persons ordered to active duty in the Armed Forces*

Section 702

(50 U.S.C. App. § 592)

(a) This section applies to a person who--

(1) after July 31, 1990, is ordered to active duty (other than for training) pursuant to section 688, 12301(a), 12301(g), 12302, 12304, 12306 or 12307, of title 10, United States Code, or who is ordered to active duty under section 12301(d) during a period when members are on active duty pursuant to any of the preceding sections<sup>23</sup>; and

(2) immediately before receiving the order to active duty--

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<sup>23</sup> Amended by Act of 10 February 1996, Pub. L. 104-106, § 1501(e)(3); 110 Stat. 501.

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(A) was engaged in the furnishing of health-care services or other services determined by the Secretary of Defense to be professional services;<sup>24</sup> and

(B) had in effect a professional liability insurance policy that does not continue to cover claims filed with respect to such person during the period of the person's active duty unless the premiums are paid for such coverage for such period.

(b)(1) Coverage of a person referred to in subsection (a) by a professional liability insurance policy shall be suspended in accordance with this subsection upon receipt of the written request of such person by the insurance carrier.

(2) A professional liability insurance carrier--

(A) may not require that premiums be paid by or on behalf of a person for any professional liability insurance coverage suspended pursuant to paragraph (1); and

(B) shall refund any amount paid for coverage for the period of such suspension or, upon the election of such person, apply such amount for the payment of any premium becoming due upon the reinstatement of such coverage.

(3) A professional liability insurance carrier shall not be liable with respect to any claim that is based on professional conduct (including any failure to take any action in a professional capacity) of a person that occurs during a period of suspension of that person's professional liability insurance under this subsection. For the purposes of the preceding sentence, a claim based upon the failure of a professional to make adequate provision for patients to be cared for during the period of the professional's active duty service shall be considered to be based on an action or failure to take action before the beginning of the period of

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<sup>24</sup>This provision was added by the 1991 Amendments and, during Desert Storm, the Secretary of Defense designated no other professionals as having protection under App. § 592. [Theoretically, mobilized Reserve Component attorneys could also benefit from this section upon a finding by the Secretary of Defense that attorneys are professionals covered by § 592.] Applies to Reserve Component attorneys called to active duty in support of Kosovo Operations under 10 U.S.C. § 12301(d) [Volunteers] or 12304 [PSRC]. See Reserve Component Note, *Professional Liability Protection for Attorneys Ordered to Active Duty*, The Army Lawyer, August 1999, at p. 44. See also Major James Pottorff, Note, *The Soldiers' and Sailors' Civil Relief Act Amendments of 1991*, The Army Lawyer, May 1991, at 47.

suspension of professional liability insurance under this subsection, except in a case in which professional services were provided after the date of the beginning of such period.

(c)(1) Professional liability insurance coverage suspended in the case of any person pursuant to subsection (b) shall be reinstated by the insurance carrier on the date on which that person transmits to the insurance carrier a written request for reinstatement.

(2) The request of a person for reinstatement shall be effective only if the person transmits the request to the insurance carrier within 30 days after the date on which the person is released from active duty. The insurance carrier shall notify the person of the due date for payment of the premium of such insurance. Such premium shall be paid by the person within 30 days after the receipt of that notice.

(3) The period for which professional liability insurance coverage shall be reinstated for a person under this subsection may not be less than the balance of the period for which coverage would have continued under the insurance policy if the coverage had not been suspended.

(d) An insurance carrier may not increase the amount of the premium charged for professional liability insurance coverage of any person for the minimum period of the reinstatement of such coverage required under subsection (c)(3) to an amount greater than the amount chargeable for such coverage for such period before the suspension, except to the extent of any general increase in the premium amounts charged by that carrier for the same professional liability coverage for persons similarly covered by such insurance during the period of the suspension.

(e) This section does not--

(1) require a suspension of professional liability insurance coverage for any person who is not a person referred to in subsection (a) and who is covered by the same professional liability insurance as a person referred to in such subsection; or

(2) relieve any person of the obligation to pay premiums for the coverage not required to be suspended.

(f)(1) A civil or administrative action for damages on the basis of the alleged professional negligence or other professional liability of a person whose professional liability insurance coverage has been suspended under subsection (b) shall be stayed until the end of the period of the suspension if--

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(A) the action was commenced during that period;

(B) the action is based on an act or omission that occurred before the date on which the suspension became effective; and

(C) the suspended professional liability insurance would, except for the suspension, on its face cover the alleged professional negligence or other professional liability negligence or other professional liability of the person.

(2) Whenever a civil or administrative action for damages is stayed under paragraph (1) in the case of any person, the action shall be deemed to have been filed on the date on which the professional liability insurance coverage of such person is reinstated under subsection (c).

(g) In the case of a civil or administrative action for which a stay could have been granted under subsection (f) by reason of the suspension of professional liability insurance coverage of the defendant under this section, the period of the suspension of the coverage shall be excluded from the computation of any statutory period of limitation on the commencement of such action.

(h) If a person whose professional liability insurance coverage is suspended under subsection (b) dies during the period of the suspension-

(1) the requirement for the grant or continuance of a stay in any civil or administrative action against such person under subsection (f)(1) shall terminate on the date of the death of such person; and

(2) the carrier of the professional liability insurance so suspended shall be liable for any claim for damages for professional negligence or other professional liability of the deceased person in the same manner and to the same extent as such carrier would be liable if the person had died while covered by such insurance but before the claim was filed.

(i) In this section:

(1) The term "active duty" has the meaning given that term in section 101 of title 10, United States Code.

(2) The term "profession" includes occupation.

(3) The term "professional" includes occupational.

*b. Health insurance reinstatement upon re-employment.*

Section 703(a)

(50 U.S.C. App. § 593)

(a) A person who, by reason of military service described in section 702(a)(1), [App. § 592(a)(1)], is entitled to the rights and benefits of this Act shall also be entitled upon release from such military service to reinstatement of any health insurance which (1) was in effect on the day before such service commenced, and (2) was terminated effective on a date during the period of such service.

(b) An exclusion or a waiting period may not be imposed in connection with reinstatement of health insurance coverage of a health or physical condition of a person under subsection (a), or a health or physical condition of any other person who is covered by the insurance by reason of the coverage of such person, if--

(1) the condition arose before or during that person's period of training or service in the Armed Forces;

(2) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the insurance; and

(3) the condition of such person has not been determined by the Secretary of Veterans Affairs to be a disability incurred or aggravated in the line of duty (within the meaning of section 105 of title 38, United States Code).

(c) Subsection (a) does not apply in the case of employer-offered insurance benefits in which a person referred to in such subsection is entitled to participate pursuant to the provisions of chapter 43 of title 38, United States Code.

(c) The amendments made by this section shall take effect as of August 1, 1990.<sup>25</sup>

The health insurance benefits provision in the SSCRA, Section 703(a) of the Act as amended in 1991, for **non**-employer purchased health insurance, closely parallels Title 38, U.S. Code Section 4317, which is the health care provision for

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<sup>25</sup>See Act of 18 March 1991, Pub. L. No. 102-12, 105 Stat. 35.

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employer-sponsored health care plans of the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>26</sup>

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<sup>26</sup> 38 U.S.C. § 4317 (1994).



## **Chapter 6**

### **Taxation**

#### **6-1. Purpose and Scope**

Congress intended that service personnel be given relief from strict compliance with the rules for the payment of taxes to various tax authorities. Public policy dictates that the service member should be spared the loss of his/her home,<sup>1</sup> the burden of penalties for nonpayment of income taxes,<sup>2</sup> and the requirement to pay a myriad of taxes to jurisdictions where he/she is situated solely because of his/her military service.<sup>3</sup> In this chapter, the provisions of sections 500, 513, and 514 of the Act [50 U.S.C. App. §§ 560, 573, and 574) will be discussed.

#### **6-2. Taxes Respecting Personalty, Money, Credits, or Realty; Sale of Property to Enforce Collection; Redemption of Property Sold; Penalty for Nonpayment; Notice of Rights to Beneficiaries of Section**

##### **Section 500**

(50 U.S.C. App. § 560)

(1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than

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<sup>1</sup>H.R. Rep. No. 3030, 76th Cong., 2d Sess. 9 (1940) (discussing the intent of § 500).

<sup>2</sup>SSCRA § 513.

<sup>3</sup>H.R. Rep. No. 2198, 77th Cong., 2d Sess. 6 (1942) (discussing the intent of § 514).



six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon.

*a. General.* Section 500 involves the sale of property resulting from tax deficiencies as well as subsequent redemption rights. Taxes include any taxes or assessment, whether special or general, due before or during the period of military service. It does not include income taxes.

*b. Property protected.* The Act specifically protects certain classes of property:

(1) personalty;

(2) money;

(3) credits; and

(4) real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his/her period of service and still occupied by his dependents or employees.

*c. Realty.* Protection of realty under this section has been the subject of court interpretation. Courts have strictly construed the limitation on the use of the property by the service member. Where the service member never resided on the land, farmed it, raised livestock on it, or leased it to another for agricultural purposes, but merely inspected it periodically for trespassers, a court held that the service member was not in "occupation of the land for agricultural purposes" and, therefore, not protected against the sale for nonpayment of taxes.<sup>4</sup>

*d. Protection provided.*

(1) *Sale of property.* Sale of the property described above may not be accomplished to enforce the collection of taxes or assessments except with permission of the court and then only when the court determines that the military service does not materially affect the service member's ability to pay. One court held that a deed issued in violation of section 500(2) was voidable.<sup>5</sup> Another court held that a grantee under such a void tax deed had no cause of action against a service member for improvements the grantee placed on the land in reliance on the deed. The grantee had been notified that a person protected by the Act owned the property.<sup>6</sup>

<sup>4</sup>Day v. Jones, 112 Utah 286, 187 P.2d 181 (1947).

<sup>5</sup>Moorman v. Thomas, 199 So. 2d 719 (1967).

<sup>6</sup>See Day v. Jones, 112 Utah 286, 187 P.2d 181 (1947).

(2) *Right of redemption.* In cases where the property may be lawfully sold to satisfy taxes or assessments, section 500(3) gives the service member a liberal period of time in which to redeem the property. Whenever protected property is sold or forfeited for the collection of taxes or assessments on the property, the service member is granted the right to redeem or commence action to redeem the property. Action must begin not later than six months after termination of military service or a later date, if a greater period for redemption is authorized by the laws of the state or territory. The ability to pay need not be materially affected by military service for section 500(3) to apply. Rights under section 500(3) are absolute rights and are not subject to judicial discretion.

If relief under section 500 is inappropriate, either because more than 6 months have passed since termination of service, or because the land is not one of the limited types listed in section 500, section 205 should be examined for possible relief.<sup>7</sup> Section 205 suspends the time for computing the limitation of actions during the period of service. This includes the period "for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment." Using section 205 in conjunction with section 500, greater relief may be obtained. In *Le Maistre v. Leffers*,<sup>8</sup> the Supreme Court held that section 205 is not restricted by section 500; rather, they supplement each other.

### **6-3. Income Taxes; Collection Deferred; Interest; Statute of Limitations**

#### **Section 513**

(50 U.S.C. App. § 573)

The collection from any person in the military service of any tax on the income of such person, whether falling due prior to or during his period of military service, shall be deferred for a period extending not more than six months after the termination of his period of military service if such person's ability to pay such tax is materially impaired by reason of such service. No interest on any amount of tax, collection of which is deferred for any period under this section, and no penalty for nonpayment of such amount during such period, shall accrue for such period of deferment by reason of such nonpayment. The running of any statute of limitations against the collection of such tax by distraint or otherwise shall be suspended for the period of military service of any individual the collection of whose tax is deferred under this section, and for an additional period of nine months beginning with the day following the period of military service. The provisions of this section shall not apply to the income tax on employees imposed by section 1400 of the Federal Insurance Contributions Act.

*a. General.* Section 513 defers collection of any income tax, federal or state, on military or nonmilitary income, falling due either before or during military service. A service member's ability to pay the tax, however, must be materially impaired by reason of service. Collection of taxes shall be deferred for a period not in excess of 6 months after the termination of

<sup>7</sup>For a full discussion of § 205, *see* para. 3.10, *supra* *Le Maistre v. Leffers*, 333 U.S. 1 (1948).

<sup>8</sup>*Le Maistre v. Leffers*, 333 U.S. 1 (1948). *See also* *Hedrick v. Bigby*, 228 Ark. 40, 305 S.W.2d 674 (1957).

military service. No interest or other penalty may accrue for the nonpayment of any tax on which collection was deferred.<sup>9</sup>

*b. Restrictions by Internal Revenue Service (IRS).* The IRS has directed<sup>10</sup> that, with regard to federal income taxes, a deferment of payment may be granted only when the service

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<sup>9</sup>Hogg v. Allen, 105 F. Supp. 12 (D.C. Ga. 1952), *rev'd in part on other grounds*, 215 F.2d 640 (5th Cir. 1954) and Paulson v. Missouri Dep't of Revenue, 1998 Mo. App. LEXIS 128, \*9-11 (Mo. App. 1998).

<sup>10</sup>Revenue Procedure 57-25, 1957-2 Cum. Bull. 1092. Deferment of the Collection of Income Tax Assessments Made Against Persons Who Are Currently in the Armed Forces of the United States.

### Section 1. Purpose

The purpose of this Revenue Procedure is to prescribe policy and procedure for the deferment of the collection of income tax assessments made against persons currently in the Armed Forces of the United States.

### Section 2. Definition

The term "initial period of service" as used in this Revenue Procedure means the period of active duty for which a taxpayer is inducted into the military service under any selective service act; the period of active duty under the first enlistment of a taxpayer in the armed service; or the period of service, prior to any reenlistment, following recall of the taxpayer to active duty from an inactive reserve or National Guard unit or the first period of reenlistment, for a taxpayer who has been out of the service for one year or more. In the case of an officer, the initial period of service will be limited to the first two years following his entry into the service under one of the above-mentioned occurrences.

### Section 3. Background

Section 513 of the Soldiers' and Sailors' Civil Relief Act of 1940, U.S.C. App. 573, incorporated into the Selective Service Act of 1948 and continued in effect by the Universal Military Training and Service Act of 1951, 50 U.S.C. App. § 451, provides that the collection of any income tax from persons serving in the military services of the United States may be postponed if such person's ability to pay is materially impaired by reason of such service. The deferment, if granted, is limited to the period of military service and six months following the day such military service ends. If collection is deferred, the statutory period for the assessment and collection of tax is suspended for the period of military service and nine months following the day such military service ends.

### Section 4. Policy

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member makes a proper application and meets the burden of proving not only an inability to pay but that the inability resulted from military service. The IRS specifically limited the application of section 513 to an *initial* period of service, defined as--

- (1) the period of induction;
- (2) a period of active duty pursuant to a first enlistment;
- (3) the period of service prior to any reenlistment following recall of the taxpayer to active duty from a Reserve or National Guard unit;
- (4) the first period of a reenlistment following a break in service of 1 year or longer; or
- (5) for an officer falling by analogy into one of the above, 2 years.

Attorneys should advise service members seeking relief beyond the limits of the regulation, but within the limits provided by section 513, to first apply administratively to the IRS for an exception.

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(..continued)

.01 Deferments of the collection of income tax assessments, outstanding against members of the Armed Forces, will not be granted except from the written request of the taxpayer, supported by satisfactory evidence that his ability to pay his account has been materially impaired due to his military service. In order to be granted a deferment, the taxpayer must show that he is serving an initial period of service, as defined, and that because of this service his ability to pay his Federal income tax has been materially impaired.

.02 Deferments will be limited to the taxpayer's initial period of service, as defined herein, and six months following the day such service ends. Immediately upon the final day of the sixth month following the end of the initial period of service, the deferred account will be moved into a collectible status and collection enforced in the same manner as any outstanding account. All rights and privileges consistent with the internal revenue laws and regulations will still be available to the taxpayer.

.03 Deferments will not be granted under Section 513 of the Soldiers' and Sailors' Civil Relief Act, *supra*, as continued in effect, except as specifically prescribed herein.

### Section 5. Collection of Interest or Penalty on Deferred Military Accounts.

Section 513 of the Soldiers' and Sailors' Civil Relief Act of 1940, *supra*, as continued in effect, provides the following with respect to the collection of interest or penalty, "No interest on any amount of tax, collection of which is deferred for any period under this section, and no penalty for nonpayment of such account during such period, shall accrue for such period of deferment by reason of such nonpayment."

c. *State income tax.* Service members seeking relief from state income taxes should apply to the local state tax authority or the state attorney general and cite section 513.

d. *Filing.* Section 513 grants relief from tax collection but not from filing returns. An extension or postponement of the time for filing may, however, be authorized under other authority. For example, personnel on duty overseas are authorized an automatic extension of two months (or longer if granted permission) for filing federal income tax returns. Personnel on duty in a combat zone are authorized to postpone filing their federal income tax returns for the duration of combat service plus 180 days. Several states provide similar relief for military personnel in filing state income taxes.

e. *Non-applicability of section 205.* Under the provisions of section 207 of the Act, the relief granted by section 205, which suspends the statute of limitations of actions during the period of service, does not apply to periods of limitations prescribed by or under the internal revenue laws of the United States.

#### **6-4. Residence for Tax Purposes**

##### Section 514

(50 U.S.C. App. § 574)

(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders. Nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

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(2) When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof, but only if a license, fee, or excise required by the State or territory, possession, or District of Columbia of which the person is a resident or in which the person is domiciled has been paid.

*a. General.* Section 514 provides that a service member neither loses nor acquires a residence for purposes of taxation with respect to his/her person, personalty, or income by reason of being absent or present in any tax jurisdiction solely in compliance with military orders. This was intended "to prevent multiple state taxation of the property and income of military personnel serving within various taxing jurisdictions through no choice of their own."<sup>11</sup>

In discussing section 514, the term "state" is intended to include the District of Columbia, possessions, and territories. The term "home state" means the "state of domicile" or the "state of residence," which for the most part have no significant difference in the application of this section.<sup>12</sup> The term "host state" means the state in which the service member is stationed or his/her state of temporary presence<sup>13</sup> when there is no distinction between the two terms. Occasionally, the service member may be stationed in one state where the post is near a state boundary and have his/her quarters in the neighboring state. In such case, the term "state of temporary presence" could refer to both, while "state of station" would refer to the military post.

The constitutionality of this section was upheld by the Supreme Court in the case of *Dameron v. Brodhead*.<sup>14</sup>

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<sup>11</sup>H.R. Rep. No. 2198, 77th Cong., 2d Sess. 6 (1942).

<sup>12</sup>The terms "domicile" and "residence" are frequently distinguished, in that domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling. *Fisher v. Jordon*, 116 F.2d 183, 186 (5th Cir. 1940). However, the Act, by stating that the residence shall not follow the service member to his military station solely by virtue of his service, in effect causes the residence to merge with, or prevents it from being distinguished from, the domicile.

<sup>13</sup>The term "state of temporary presence" was used cautiously by the Supreme Court in *Dameron v. Brodhead*, 345 U.S. 322, 326 (1953), and distinguished from the term "original residence."

<sup>14</sup>*Dameron v. Brodhead*, 345 U.S. at 324.

Domicile for purposes of taxation is determined by a myriad of factors, the most important being physical presence in a state and a showing of intent to permanently reside in that state. Some of the most influential factors include where you: live, own real property, have occupational licenses, vote, register your motor vehicle, pay state income and property taxes, maintain your driver's license<sup>15</sup>, and declare to be your legal residence on court and other legal documents.<sup>16</sup> Often states and localities will argue that service members voluntarily registering to vote in a host state under the new "motor voter" laws, or registering their cars for convenience in their host state, have automatically shown intent to change domicile to the home state.<sup>17</sup> A state may not presume a military member's domicile is the same as their non-military spouse in determining a change of domicile claim.<sup>18</sup>

What do you need to do if you want to change domicile while in military service? If you are a resident of a high tax state and wish to change your domicile to a no income tax state like Alaska, Nevada, Florida or Texas, you must prove your actual physical presence in the state, and the factors listed above as to intent to make the new state your permanent place of abode. You do not have to stay a resident of the state from which you entered the military service. You can change your state domicile during your military career, provided you are willing to demonstrate physical presence and the intent factors listed above to doubting losing state tax authorities.<sup>19</sup> Military members notify the Department of Defense Finance and Accounting Service (DFAS) of their desire to change domicile by filing a DD Form 2058, State of Legal Residence Certificate.

<sup>15</sup>Virginia Dep't of Taxation, P.D. 99-132, 1999 Va. Tax LEXIS 131 (Va. June 7, 1999) (military member having a Virginia driver's license will not trigger a change of domicile to Virginia for income tax purposes).

<sup>16</sup>*Id.*; see Juskowiak v. Minn. Comms'r of Revenue, 1996 Minn. Tax LEXIS 17 (March 18, 1996); Wolf v. Minn. Comms'r of Revenue, 1999 Minn. Tax LEXIS 41 (August 17, 1999); Wolff v. Baldwin, 9 N.J. Tax 11 (1986); Comptroller of the Treasury v. Lenderking, 303 A.2d 402, 405 (Md. 1973); California Franchise Tax Bd. Legal Ruling No. 54, Residence: Effect of Military Personnel Registering to Vote, 1958 Cal. FTB LEXIS 54 (Cal FTB 1958); Friske v. Friske, 290 P.2d 725 (Wash. 1955). See also Veldhuyzen and Wright, "Domicile of Military Personnel for Voting and Taxation," The Army Lawyer, Sep. 1992 at 15; Iowa Admin. Code, Ch. 701, Sec. 38.17 (1995).

<sup>17</sup>*Id.* See also Matter of Karsten, 924 P.2d 1272 (Ks. App. 1996) (voluntary registration of motor vehicles by Fort Riley soldiers in host state/county does not equate to automatic change of domicile allowing personal property taxation).

<sup>18</sup>United States v. State of Minnesota, 97 F. Supp. 2d 973, 2000 U.S. Dist. LEXIS 7702 (D. Minn. 2000).

<sup>19</sup>The difficulties of military members changing state of domicile are illustrated by Letter No. IT 96-0010, 1996 WL 305698 (Ill. Dept. Rev. 1996) (unpub.) and Juskowiak v. Minn. Comms'r of Revenue, 1996 Minn. Tax LEXIS 17; Matter of Mr. and Mrs. Applicant, 1986 Alaska Tax LEXIS 5 (Alaska Tax Comm. 1986) (service member difficulty in establishing residency to obtain Alaska Permanent Fund Dividend); and Matter of Borman, 1996 Iowa Tax LEXIS 14 (Iowa Tax Comm. 1996).

b. *Income tax.* Unless it is also the home state, the host state may not tax the compensation a service member receives "for military and naval service" because this compensation "shall not be deemed income for service performed" in the host state. This is a statutory exception to the general rule that income may be taxed where it is earned as well as where the taxpayer is domiciled.<sup>20</sup>

At least one court has determined that a school board cannot charge nonresident service members tuition for children enrolled in the host state public schools. Although the tuition charge was not an income tax or a personal property tax, its effect was the same. Service members would be double taxed by supporting school systems in their states of domicile as well as in the host state. The court determined that the Act was intended to prevent such a situation. Accordingly, it held that the tuition requirement was invalid under the supremacy clause.<sup>21</sup>

Income derived from off-duty employment, on or off post, is not "compensation for military and naval service" and, therefore, does not have the protection of the Act. This leaves off-duty income vulnerable to the general rule that it may be taxed by the state where it is earned and by the home state. If the state where the off-duty income is earned is other than the host state, such as when the soldier works in a state adjoining his/her military post, the host state may not tax the income because the service member is a nonresident with respect to the host state. The host state may only tax nonresidents on income earned within its boundaries.<sup>22</sup>

Section 514 does not protect income earned by dependents of service members. Thus, a nonmilitary spouse's income might be taxed by (1) the home state, (2) the host state, and (3) the state where the income is earned. If the state where the income is earned is other than the host state, for example, when the duty station is near a state boundary, the only theory upon which the host state could tax is that the dependent acquired a statutory residence in the host state. Attorneys should examine the law of the host state to determine if the dependent, especially the spouse, acquires a residence for tax purposes. Attorneys should determine the length of temporary presence in the host state necessary to qualify as a resident for tax purposes.

A 1994 case shed new light on the scope of the protection afforded by the section. In *Fatt v. Utah*, the state attempted to tax the military pay of a Native American.<sup>23</sup> The service person was a resident on a reservation within the state. Pursuant to federal law, his income was not taxable by the state. Utah argued unsuccessfully that the income earned while in the Navy in San Diego was income earned off of the reservation. The Utah Supreme Court rejected this argument noting that the SSCRA makes the domicile permanent.<sup>24</sup> Although the court did not expressly address the

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<sup>20</sup>New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

<sup>21</sup>United States v. Onslow County Bd. of Educ., 728 F.2d 628 (4th Cir. 1984).

<sup>22</sup>New York *ex rel.* Whitney v. Graves, 299 U.S. 366 (1937).

<sup>23</sup>Fatt v. Utah, 884 P.2d 1233 (Ut. 1994); Turner v. Wisconsin Dep't of Revenue, 1986 W.L. 2536 (Wis. Tax. App. Comm. 1986) (unpub.). Federal case law holds that the right to tax Native Americans is reserved to the federal government unless the authority is released to the state.

<sup>24</sup>Fatt v. Utah, 884 P.2d at 1233-36.



issue, it is reasonable to conclude that the protection afforded by the SSCRA would apply to all state taxes tied to domicile location within the state.

Although states may not tax a nonresident service member's military income, a number of states take it into account. Kansas, and several other states, including California, have a method that has survived legal challenge. For purposes of calculating the tax bracket of a nonmilitary spouse who earned income in the state, the state adds in the service member's military income to determine a higher tax rate based upon joint income if the couple filed a joint federal return. (Most of these states require individuals to file a joint state return, if they filed a joint federal return.) Although the service member's income is not taxed, the spouse's income is thereby taxed at a higher rate. This practice has been upheld by the Tenth Circuit.<sup>25</sup>

In situations where the service member, his/her dependent, or both, are properly subject to taxation by two or more states, the service member and his/her dependents may be eligible for tax credits. Generally, this is a credit against the tax of the home state in the amount of the tax paid to the state where the income was earned. There may be amount limitations or other formulas to determine the amount of the credit. Another form of tax credit occurs when the state in which the income is earned gives the nonresident taxpayer credit for tax on the income paid in the home state. In either case, state statutes are generally worded to prevent the tax credit from being taken twice. Other forms of relief may consist of an exclusion or deduction of the income from the gross income reported to the home state when tax was paid to the state where it was earned, or merely an itemized deduction of the tax paid to the other state.

The authority of the host state to tax the income earned by off-duty personnel or any other persons working or residing on post, regardless of the nature of federal jurisdiction over the post, is contained in the "Buck Act" of 1940.<sup>26</sup> Since employment by a nonappropriated fund activity is not based on military orders, and wages are not paid from appropriated funds, there is no authority for regarding the income derived therefrom as "compensation for military and naval service." Income from nonappropriated funds is derived from services rendered within the host state, and falls under the tax authority given the host state in the Buck Act.

<sup>25</sup>United States v. Kansas, 580 F. Supp. 512 (D. Kan. 1984), *aff'd*, 810 F.2d 935 (10th Cir. 1987). The so-called "Kansas Rule" is currently followed by the states of California, Kansas, Missouri, Nebraska, Utah, and Vermont. A good example of the "Kansas Rule" application is *Coley v. State Bd. of Equalization*, 1996 Cal. Tax LEXIS 335 (Oct. 10, 1996)(unpub.). See Robert L. Minor, "Inclusion of Nonresident Military Income In State Apportionment of Income Formulas: Violation of the Soldiers' and Sailors' Civil Relief Act?", 102 MIL. L. REV. 97 (1983).

<sup>26</sup>4 U.S.C. §§ 105-110 (1988). Section 106(a) provides:

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

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c. *Real property.* Real property is excluded from section 514 since it is generally taxed only by the state in which it is situated. Therefore, it is not affected by one's status, whether a domiciliary or a resident, military or civilian.<sup>27</sup>

d. *Tangible nonbusiness personal property.* Section 514 states that for purposes of taxation, nonbusiness personal property "shall not be deemed to be located or present in or to have a situs for taxation" in the host state. This section does not, however, extend protection to property owned by the service member's dependents. Examples of, and exceptions to, this general rule follow.

(1) *Sales and use taxes.* In *Sullivan v. United States*,<sup>28</sup> the Supreme Court held that section 514 does not exempt service members from sales and use taxes imposed by a state other than the state of domicile.

In *Sullivan*, the Court determined that sales and use taxes are not imposed on the property itself. Rather, a sales tax is an excise imposed upon the sale transaction, and a use tax is "in the nature of an excise upon the privilege of using, storing or consuming property."<sup>29</sup> Since these taxes are not *on* the property itself, it does not matter where the property is "deemed" to be in a physical or constructive sense.<sup>30</sup> Congressional action in the Buck Act of 1940<sup>31</sup> dealt specifically with sales and use taxes. State authorities were authorized to collect such taxes on land subject to Federal

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<sup>27</sup>See para. 6-4d(2)(d), *infra*, for the treatment of mobile homes as real property. See also *Charleston County Assessor V. Schmidt*, 1998 S.C. Tax LEXIS 56 (July 9, 1998) (service member may not use SSCRA to claim lower resident-occupied real property tax rate on real property rented while on active duty outside state.)

<sup>28</sup>*Sullivan v. United States*, 395 U.S. 169 (1969). See also *Re: Section 58.1-1821 Application: Retail Sales and Use Tax*, 1994 Va. Tax LEXIS 275 (Va. Tax Comm. 1994) (military member stationed in Virginia purchases furniture in another state, without payment of Virginia sales tax, is subject to Virginia use tax.); *In re Sales/Use Tax* December 1983, No. 85-73, 1985 R.I. Tax LEXIS 72 (R.I. Tax Comm. 1985) (sales tax on motor vehicle purchase); and *Matter of SSG Ojeda*, 1985 N.Y. Tax LEXIS 125 (N.Y. Tax Comm. 1985).

<sup>29</sup>*Id.* at 177, quoting *Connecticut Light & Power Co. v. Walsh*, 134 Conn. 295, 307, 57 A.2d 128, 134 (1948).

<sup>30</sup>*Dameron v. Brodhead*, 345 U.S. at 326.

<sup>31</sup>4 U.S.C. §§ 105-110. (1988)

jurisdiction,<sup>32</sup> except for sale or use of property sold by the United States or its instrumentalities through a commissary, a ship store, or the like.<sup>33</sup>

The Supreme Court, in *Sullivan*, in addition to allowing the sales tax, was reluctant to bar the imposition of the closely related use tax, despite the existence of section 514. Section 514 prohibits host state taxes "with respect to personal property, or the *use* thereof" and "in respect to motor vehicles or the *use* thereof." The Court held that Congress intended to limit protection of service members' personal property. Only "annually recurring taxes on property--[including] the familiar ad valorem personal property tax,"<sup>34</sup> are prohibited.

While the *Sullivan* case makes it clear that a tax on the sales transaction, whether it is called a sales tax or a use tax, may be imposed by the state, there remains the problem of whether a service member's property is subject to such a tax each time he/she moves the property to a new state. Service members should retain evidence of sales taxes paid on the purchase of major items, if not all items, to avoid further taxation upon relocation. Ordinarily, a credit in the amount of the sales tax paid will be given by the authority imposing the use tax. Because this is strictly a state function,

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<sup>32</sup>4 U.S.C. § 105(a) (1988) provides:

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

<sup>33</sup>4 U.S.C. § 107 provides:

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary un-incorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch.

<sup>34</sup>*Sullivan v. United States*, 395 U.S. at 176.

however, which under the *Sullivan* case is not subject to the protection of section 514, there is no federal assurance that states will grant a credit or exemption for sales taxes paid.<sup>35</sup>

(2) *Ad valorem tax.*<sup>36</sup> The host state may not impose an ad valorem tax on the nonbusiness personal property of nonresident service members. The right to impose this tax is reserved to the home state. Whether the home state has such a tax or enforces it with regard to service members is of no concern to the host state. The Act's prohibition of taxes of this type is absolute.<sup>37</sup> A municipal tax on such property by the political subdivision of the host state where a service member lives, while actually assigned for duty in another subdivision in the same state, likewise may not be imposed.<sup>38</sup>

(a) *Constructive placement.* Since the law allows the use of the fiction that personal property is not in the place where it is physically located for the purpose of assessing an ad valorem tax, the home state could legally apply a reverse fiction in finding its legal presence for tax purposes in a place where it is not. The application of this fiction would, however, have practical drawbacks, especially where the tax assessor must see the property in order to set a tax.

(b) *Jointly Held Personal Property/Community Property.* Non-military spouses, if included on the title of a taxable personal property item (e.g., a boat, trailer, or motor vehicle) as joint owners or having community property ownership, probably defeat the protection from host state taxation of the personal property provided by Section 514.<sup>39</sup> Most states take the position that since the SSCRA only protects property owned solely by the service member from state income taxation, jointly owned personal property may be taxed by the state of domicile as well

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<sup>35</sup>See State of Connecticut Special Notice, "Sales of Motor Vehicles to Nonresident Military Personnel and Joint Sales of Motor Vehicles to Nonresident Military Personnel and their Spouses", SN 99(5), 1999 Conn. Tax LEXIS 37 (April 14, 1999) (Connecticut allows nonresident military members and their spouses to purchase motor vehicles with a reduced sales/use tax); Nebraska Attorney General Opinion No. 99043, "Taxation of Motor Vehicles of Active Duty Military Personnel Stationed in Nebraska", 1999 STT 198-11 (September 27, 1999) (details the rules for taxation of military members motor vehicles in Nebraska).

<sup>36</sup>The term "ad valorem tax" means a tax or duty upon the value of the article or thing subject to taxation. *Arthur v. Johnson*, 185 S.C. 324, 327, 194 S.E. 151, 154 (1937).

<sup>37</sup>*Dameron v. Brodhead*, 345 U.S. 322 (1953).

<sup>38</sup>*Woodroffe v. Village of Park Forest*, 107 F. Supp. 906 (N.D. Ill. 1952). The court went into great detail to show that the service member was still a resident of Pennsylvania and that despite his long period of service in Illinois the exemptions of § 514 still applied.

<sup>39</sup>*Wanner v. Glen Ellen Corp.*, 373 F. Supp. 983, 986 (D.Vt. 1974) (non-military spouse not included within the definition of "persons in military service" under the SSCRA.) See generally, Lieutenant Colonel Paul Conrad, Note, *Nonmilitary Spouse's Joint Ownership of Personal Property Voids Soldiers' and Sailors' Civil Relief Act Personal Property Tax Protection*, *The Army Lawyer*, August 1997, at 24.

as the state of actual situs.<sup>40</sup> No appellate court has yet ruled on whether a joint owner is entitled to personal property tax relief under the SSCRA. Taxation rates vary from half to full value.<sup>41</sup>

(c) *Property located on federally controlled lands.* Regardless of whether the property is owned by the service member or his/her dependent, if the property is located on an installation subject to the *exclusive* jurisdiction of the Federal government, the state may not impose an ad valorem personal property tax.<sup>42</sup> Exclusive federal jurisdiction means "exclusive legislative jurisdiction" and is applied to situations wherein the Federal Government has received, by whatever method, all the legislative authority of the state. Usually the state has reserved only the right to serve process regarding activities that occurred off the land involved.<sup>43</sup> The fact that the post or installation exists does not automatically mean the installation is subject to exclusive federal jurisdiction. On the contrary, the current trend is away from exclusive jurisdiction to arrangements in which the state will have more authority.<sup>44</sup> Quite often, the type of jurisdiction may vary from one place to another on the same reservation.

(d) *Motor vehicles.* Section 514(2)(b) provides that the term taxation includes "licenses, fees, or excises in respect to motor vehicles or the use thereof" but only if a license, fee, or excise required by the home state has been paid. In *California v. Buzard*,<sup>45</sup> the Supreme Court held that even though the law of the home state exempted a resident from payment of a license, fee, or excise when the vehicle was not driven in the home state, the service member would have to register and license his vehicle in his home state in order to qualify for the exemption from payment of a license, fee, or excise tax in the host state. If a service member does not pay to license and register his car in his home state, the host state may require him to pay in order to register his vehicle in the host state. The service member does not, however, have to pay the entire amount assessed if a portion of the license, fee, or excise exceeds the amount necessary to defray the cost of issuance and administration. The Court also held in *Buzard* that the excessive amount is

<sup>40</sup> Ariz. Atty. Gen. Op. 86-092 (August 25, 1986); South Carolina Atty. Gen. Op. 85-92 (August 27, 1985); 1960/61 Rep. A.G. 301 (Virginia, 1961). But see Mississippi Atty. Gen. Op. (February 27, 1989) (non-resident active duty service member jointly owned motor vehicles are not subject to Mississippi ad valorem [personal property] taxes).

<sup>41</sup> Comment, State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act, 36 MIL. L. REV. 123 (1967). The Commonwealth of Virginia taxes the full value of personal property held in the joint names of a military member and the nonmilitary spouse. See 1976-77 Op. Va. Att'y. Gen. 285 (1976), and Conrad, *supra* note 39.

<sup>42</sup> Surplus Trading Co. v. Cook, 281 U.S. 647 (1930). 4 U.S.C. §§ 105-110, does not apply to the ad valorem personal property tax; hence, this case was not overruled by the statute.

<sup>43</sup> Administrative and Civil Law Department, The Judge Advocate General's School, U.S. Army, JA 221, Law of Military Installations Deskbook, para. 2-5 (Sep. 1996).

<sup>44</sup> *Id.*, at para. 2-7f.

<sup>45</sup> California v. Buzard, 382 U.S. 386 (1966).

an ad valorem tax that may not be imposed by the host state upon a service member's personal property. This specifically includes motor vehicles.<sup>46</sup>

The motor vehicle, then, may fit into two categories. First, as a piece of tangible non-business property it is exempt from ad valorem taxes regardless of the authority or desire of the host state to tax it. Second, as a machine that moves on the streets and highways of the host state, it is subject to the police power of the host state. A state may exercise its police power to require a service member to register a vehicle in its jurisdiction if, and only if, the service member has not registered the vehicle in the home state. Where the registration fee or license may properly be exacted by the host state, any portion assessed as revenue need not be paid.

A similar rule applies to the requirement for municipal registration. So long as the requirements of the home state are met, the political subdivision has no greater right than the host state to impose its own requirements. A service member need not, however, pay a similar tax or fee to the state of domicile in order to avoid municipal revenue-raising taxes in the host state.<sup>47</sup> Nonresident service members are exempt from paying revenue-raising taxes regardless of whether they paid similar taxes in their state of domicile.<sup>48</sup>

(e) *Mobile homes.* If the host state treats a mobile home as tangible nonbusiness personal property, the mobile home has the same protection as a motor vehicle or any other such property with regard to ad valorem taxes imposed by the host state.<sup>49</sup> If the law of the host state also classifies the mobile home as a motor vehicle, registration with its accompanying license, fee, or excise may be imposed if the service member has not complied with the registration requirements of his home state. The same restrictions prohibiting the state from imposing an ad valorem tax in the form of a license, fee, or excise also apply.

By making certain modifications to a mobile home, such as removing wheels or installing plumbing and electrical connections, an owner may make the mobile home relatively affixed to the land. In some states, the mobile home may then be treated as a piece of real property. However, state labels are not conclusive. In *United States v. Chester Co. Bd of Assess*, the court determined that the scope of the Act raises a federal question which does not depend on the "divers interpretations by the several states of what is personal or real property."<sup>50</sup>

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<sup>46</sup>*Id.*, at 392. The host state attempted to impose an \$8.00 standard fee which was held reasonable and a \$100.00 fee based upon the value of the vehicle. The latter was determined to be an ad valorem tax.

<sup>47</sup>*United States v. City of Highwood*, 712 F. Supp. 138 (N.D. Ill. 1989) (city could not require nonresident Fort Sheridan soldiers to pay revenue raising fee on vehicles operated within the city).

<sup>48</sup>*Id.*

<sup>49</sup>*Snapp v. Neal*, 382 U.S. 397 (1966) (this is a companion case to and decided on the same day as *California v. Buzard*, 382 U.S. 386); *United States v. Illinois*, 525 F.2d 374 (7th Cir. 1975) (mobile home is personal property under Illinois law; county could not impose personal property tax on mobile homes owned by nonresident service members).

<sup>50</sup>*United States v. Chester Co. Bd. of Assess*, 281 F. Supp. 1001 (E.D. Pa. 1968).

*e. Intangible nonbusiness personal property.* This category includes stocks, bonds, and bank deposits. Subject to taxation are the income derived from this property and the value of the property itself.

(1) *Income.* Traditionally, the owner's legal domicile has taxed income from intangible property.<sup>51</sup> In this regard, the authority to impose an income tax on intangibles is independent of the authority to impose an ad valorem tax on intangibles.<sup>52</sup>

(2) *Ad valorem tax.* Intangibles have as their taxable situs the service member's domicile.<sup>53</sup> While generally not the practice, there appears to be no legal obstacle to imposition of such a tax on dependents' intangible nonbusiness property by virtue of their acquired residence.<sup>54</sup>

(3) *Transfer taxes.* No court has addressed relief from payment of state or local taxes on the transfer of securities, but it is doubtful that Congress intended to preclude this type of tax. This conclusion is supported by the rule in the *Sullivan* case.<sup>55</sup>

*f. Motor vehicle operator permits.* The SSCRA does not preclude states from requiring persons who live within their borders to acquire a driver's license. Many states, however, allow service members to retain their license if issued from their domicile.

*g. Business property.* Whether tangible or intangible, owned by the service member or his/her dependent, section 514 specifically excludes property used in a business or trade from protection under the Act. Therefore, the value and income derived from business property may properly be taxed in the state where the business or trade is conducted. The host state may also exact revenue producing licenses, fees, and excises. An automobile used by a dependent to drive to and from work, however, should not be considered business property.

Included in this category is the income derived from the rental of real property which, for example, was purchased at the last duty station and rented out in lieu of selling it upon reassignment. If the home is located in a state other than the home state, the service member should investigate whether or not the home state treats this income as taxable.<sup>56</sup>

<sup>51</sup>*Suttles v. Illinois Glass Co.*, 206 Ga. 849, 59 S.E.2d 394 (1950).

<sup>52</sup>*New York ex rel. Cohn v. Graves*, 300 U.S. 308.

<sup>53</sup>*Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936); *also see* text, para. 6-4d, *infra*.

<sup>54</sup>*Curry v. McCanless*, 307 U.S. 357 (1939); *Graves v. Elliott*, 307 U.S. 383 (1939). These cases apply only to death taxes and do not directly address the ad valorem tax itself.

<sup>55</sup>*Sullivan v. United States*, 395 U.S. 169.

<sup>56</sup>*Christian v. Strange*, 96 Ariz. 106, 392 P.2d 575 (1964).

h. *Ad valorem tax on leased motor vehicles.* Service member leased vehicles may be taxed by host state and local governments, since the lessor is the owner of the leased vehicle, the SSCRA provides no protection from such taxation. Service members may have limited recourse if this provision is not disclosed as required by Federal Reserve Regulation M, Federal Consumer Leasing Act.<sup>57</sup>

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<sup>57</sup>15 U.S.C. §§ 1667a(3). *See also* 61 Fed. Reg. 52,258 (Oct. 7, 1996), *to be codified as* 12 C.F.R. Part 213 [Regulation M], including 12 C.F.R. § 213.4(g)(4) and (5).





## **Chapter 7**

### **Public Lands**

#### **7-1. Purpose and Scope**

Sections 501-505 of the Act [50 U.S.C. App. §§ 561-565] provide the service member who is a homestead or desert-land entryman,<sup>1</sup> who has a mining claim, or whose widow has a claim to such land, with the right to obtain waiver of certain requirements as to occupancy and improvement of public lands.<sup>2</sup>

#### **7-2. Rights to Public Lands Not Forfeited; Grazing Lands**

##### **Section 501**

(50 U.S.C. App. § 561)

(1) No right to any lands owned or controlled by the United States initiated or acquired under any laws of the United States, including the mining and mineral leasing laws, by any person prior to entering military service shall during the period of such service be forfeited or prejudiced by reason of his absence from the land or his failure to perform any work or make any improvements thereon or his failure to do any other act required by or under such laws.

(2) If a permittee or licensee under the Act of June 28, 1934 (48 Stat. 1269), enters military service, he may elect to suspend his permit or license for the period of his military service and six months thereafter, and the Secretary of the Interior by regulations shall provide for such suspension of permits and licenses and for the remission, reduction, or refund of grazing fees during such suspension.

(3) This section shall not be construed to control specific requirements contained in this article [App. §§ 560-574].

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<sup>1</sup>An entryman is one who makes an entry onto homestead or desert-land as an initial step to acquiring ownership under the public land laws of the United States. *Indian Cove Irr. Dist. v. Prideaux*, 25 Idaho 112, 114, 136 P. 618, 620 (1913).

<sup>2</sup>S. Rep. No. 2109, 76th Cong., 3d Sess. 3 (1940).

**7-3. Homestead Entries and Settlement Claims; Service as Equivalent to Residence and Cultivation**

Section 502

(50 U.S.C. App. § 562 )

If any person whose application for a homestead entry has been allowed or who has made application for homestead entry which may thereafter be allowed, after such entry or application enters military service, or if any person who has a valid settlement claim enters military service, the Department of the Interior shall construe his military service to be equivalent to residence and cultivation upon the tract entered or settled upon for the period of such service. From the effective date of this Act no contest shall be initiated on the ground of abandonment and no allegation of abandonment shall be sustained against any such person, unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases initiated subsequent to the effective date of this Act that the alleged absence from the land was not due to such military service. If such person is discharged on account of wounds received or disability incurred in the line of duty, the term of his enlistment and any period of hospitalization due to such wounds or disability shall be deducted from the required length or residence, without reference to the time of actual service. No patent shall issue to any such person who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

**7-4. Same; Death or Incapacity During or Resulting from Service as Affecting Rights; Perfection of Rights**

Section 503

(50 U.S.C. App. § 563)

(1) If any person whose application for a homestead entry has been allowed or who has made application for homestead entry which may thereafter be allowed or who has a valid settlement claim dies while in military service or as a result of such service, his widow, if unmarried, or in the case of her death or marriage, his minor children, or his or their legal representatives, may proceed forthwith to make final proof upon such entry or upon an application which is allowed after the applicant's death, or upon a homestead application thereafter allowed based on a valid settlement claim, and shall be entitled to receive a patent for such land. The death of such person while in military service or as a result of such service shall be construed to be equivalent to a performance of all requirements as to residence and cultivation upon such homestead or claim, notwithstanding the provisions of section 502 of this Act.

(2) If such person is honorably discharged and because of physical incapacities due to such service is unable to return to the land, he may make

final proof without further residence, improvement, or cultivation, at such time and place as the Secretary of the Interior may authorize and receive a patent to the land entered.

- (3) The Act of July 28, 1917 (40 Stat. 248), is repealed.

## **7-5. Desert-land Entries; Suspension of Requirements**

### **Section 504**

(50 U.S.C. App. § 564)

(1) No desert-land entry made or held under the desert-land laws prior to the entrance of the entryman or his successor in interest into military service shall be subject to contest or cancellation for failure to make or expend the sum of \$1 per acre per year in improvements upon the claim or to effect the reclamation of the claim during the period the entryman or his successor in interest is engaged in military service or during a period of six-months thereafter any period of hospitalization because of wounds or disability incurred in the line of duty. The time within which such entryman or claimant is required to make such expenditures and effect reclamation of the land shall be exclusive of his period of service and the six-months' period and any such period of hospitalization.

(2) If such entryman or claimant is honorably discharged and because of physical incapacities due to such service is unable to accomplish reclamation of, and payment for, the land, he may make proof without further reclamation or payments under such rules as the Secretary of the Interior may prescribe and receive patent for the land entered or claimed.

(3) In order to obtain the benefits of this section, such entryman or claimant shall, within six months after his entrance into military service, file or cause to be filed in the land office of the district in which his claim is situated a notice that he has entered military service and that he desires to hold the desert claim under this section.

## **7-6. Mining Claims; Requirements Suspended**

### **Section 505**

(50 U.S.C. App. § 565)

(1) The provisions of section 2324 of the Revised Statutes of the United States (30 U.S.C. § 28), which require that on each mining claim located after May 10, 1872, and until patent has been issued therefor not less than \$100 worth of labor shall be performed or improvements made during each year, shall not apply during the period of his service, or until six months after the termination of such service, or during any period of hospitalization because of wounds or disability incurred in line of duty, to claims or interests in claims which are owned by a person in military service and which have been regularly located and recorded. No mining claim or any interest in a claim which is owned by such a person and which has been regularly located and recorded shall be subject to forfeiture by nonperformance of the annual assessments during the period of such military service, or until six months after the termination of such service or of such hospitalization.

(2) In order to obtain the benefits of this section, the claimant of any mining location shall, before the expiration of the assessment year during which he enters military service, file or cause to be filed in the office where the location notice or certificate is recorded a notice that he has entered such service and that he desires to hold his mining claim under this section.

## **7-7. Mineral Permits and Leases; Suspension of Operations and Term of Permits and Leases**

### **Section 506**

(50 U.S.C. App. § 566)

(1) Any person holding a permit or lease on the public domain under the Federal mineral leasing laws who enters military service may, at his election, suspend all operations under his permit or lease for a period of time equivalent to the period of his military service and six months thereafter. The term of the permit or lease shall not run during such period of suspension nor shall any rentals or royalties be charged against the permit or lease during the period of suspension.

(2) In order to obtain the benefit of this section, such permittee or lessee shall, within six months after his entrance into military service, notify the Bureau of Land Management by registered mail of his entrance into such service and of his desire to avail himself of the benefits of this section.

(3) This section shall not be construed to supersede the terms of any contract for operation of a permit or lease.

**7-8. Right to Take Action for Perfection, Defense, etc., of Rights as Unaffected; Affidavits and Proofs**

Section 507

(50 U.S.C. App. § 567)

Nothing in this article [App. §§ 560-574] shall be construed to limit or affect the right of a person in military service to take any action during his period of service which may be authorized by law or the regulations of the Department of the Interior for the perfection, defense, or further assertion of rights initiated or acquired prior to the date of entering military service. It shall be lawful for any person while in such service to make any affidavit or submit any proof which may be required by law or the practice of regulations of the Bureau of Land Management in connection with the entry, perfection, defense, or further assertion of any rights initiated or acquired prior to entering such service, before the officer in immediate command and holding a commission in the branch of the service in which the person is engaged. Such affidavits shall be as binding in law and with like penalties as if taken before an officer designated by the Secretary of the Interior of a United States land office. The Secretary of the Interior may issue rules and regulations to effectuate the purposes of section 501 to 512 [App. §§ 561-572].

**7-9. Irrigation Rights; Residence Requirements Suspended**

Section 508

(50 U.S.C. App. § 568)

The Secretary of the Interior is hereby authorized, in his discretion, to suspend as to persons in military service during the period while this Act remains in force and for a period of six months thereafter or during any period of hospitalization because of wounds or disability incurred in line of duty that provision of the act known as the "Reclamation Act" requiring residence upon lands in private ownership or within the neighborhood for securing water for the irrigation of the same, and he is authorized to permit the use of available water thereon upon such terms and conditions as he may deem proper.

**7-10. Distribution of Information Concerning Benefits of Article; Forms**

Section 509

(50 U.S.C. App. § 569)

The Secretary of the Interior shall issue through appropriate military and naval channels a notice for distribution by appropriate military and naval authorities to persons in the military service explaining the provisions of this article except as to sections 500, 513, and 514 hereof and shall furnish forms to be distributed in like manner to those desiring to make application for its benefits, except as to said sections.

**7-11. Homestead Entrymen Permitted to Leave Entries to Perform Labor**

Section 510

(50 U.S.C. App. § 570)

(1) During the pendency of any war in which the United States may be engaged while this Act remains in force any homestead entryman shall be entitled to a leave of absence from his entry for the purpose of performing farm labor. The time actually spent in farm labor shall be counted as constructive residence, if within fifteen days after leaving his entry to engage in such labor the entryman files a notice of absence in the land office of the district in which his entry is situated, and if at the expiration of the calendar year the entryman files in that office a written statement under oath and corroborated by two witnesses giving the date or dates when he left his entry, the date or dates of his return, and the place where and person for whom he was engaged in farm labor during such period or periods of absence.

(2) Nothing in this section shall excuse any homestead entryman from making improvements or performing the cultivation upon his entry required by law. The provisions of this section shall apply only to persons whose applications have been allowed or filed before October 17, 1940.

**7-12. Land Rights of Persons Under 21**

Section 511

(50 U.S.C. App. § 571)

Any person under the age of twenty-one who serves in the military service while this Act remains in force shall be entitled to the same rights under the laws relating to lands owned or controlled by the United States, including the mining and mineral leasing laws, as those over twenty-one now possess under such laws. Any requirements as to establishment of residence within a limited time shall be suspended as to entry by such person until six months after his discharge from military service. Applications for entry may be

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verified before any officer in the United States or any foreign country authorized to administer oaths by the laws of the State or Territory in which the land may be situated.

### **7-13. Extension of Benefits to Persons Serving With War Allies of the United States**

#### Section 512

(50 U.S.C. App. § 572)<sup>3</sup>

Citizens of the United States who serve with the forces of any nation with which the United States may be allied in the prosecution of any war in which the United States engages while this Act remains in force shall be entitled to the relief and benefits afforded by sections 501 to 511, inclusive, if such service is similar to military service as defined in this Act, and if they are honorably discharged and resume United States citizenship or die in the service of the allied forces or as a result of such service.

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<sup>3</sup>This section should be read in conjunction with § 104 [App. § 514] on the same subject, a discussion of which is found in para. 2.5, *supra*.





## **CHAPTER 8**

# **THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**



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## CHAPTER 8

# **THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**

## **OUTLINE**

### **I. INTRODUCTION.**

#### **A. Why Do I Need to Know About the SSCRA?**

1. As a Judge Advocate officer, you are responsible to ensure that sailors, soldiers, airman, and marines of all components are aware of their rights under the SSCRA.
  - a) Army: AR 27-3, The Army Legal Assistance Program, (10 Sep 95), paras. 3-4 and 3-6.
  - b) Air Force: AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs (1 May 1996), paras. 1.3.1 and 3.2.2.
  - c) Navy and Marine Corps: JAGMAN, Chap. VII, and JAGINST 5801.1, Legal Checkup Program.
2. SSCRA is the bedrock of all service preventive law programs and a key component of command legal readiness, especially for deploying and mobilizing forces of all components.
3. CAVEAT: The SSCRA contains provisions such as life insurance guarantees (Article IV) and provisions regarding public lands (Article VI). These protections are beyond the scope of this outline. Rather, this outline is keyed to the current SSCRA statute sections at 50 U.S.C. App. §500 et. seq., instead of the sections of the original SSCRA.
4. Best Sources of SSCRA Guidance: JAGCNET and JA 260, SSCRA Guide (July 2000).
5. SSCRA 1991 Amendments.

- a) Future Financial Arrangements - added 50 U.S.C. App. § 518. Future Protection for Persons using the SSCRA. The fact that a person has availed himself of protection under the Act may not be reported as adverse information against him and used to deny him credit in future financial arrangements. CAVEAT: This "safe-harbor" does not prevent an institution from reporting a failure to comply with an underlying obligation.
  
- b) Added U.S. Air Force and Reserve Component coverage explicitly to the Act.
  
- c) Durable Powers of Attorney for MIA's. All POA's for military are deemed durable for the entire period of imprisonment for POW's notwithstanding expiration dates contained in the document itself.
  
- d) Added 50 U.S.C. App. § 592 - Professional Liability Insurance for Certain Persons Ordered to Active Duty in the Armed Forces.
  - (1) Applies to health care professionals or other persons as determined by the Secretary of Defense [possibly including Reserve Component attorneys].
  
  - (2) Who had liability coverage in force before coming on active duty.
  
  - (3) Allows for suspension of policy while on active duty, refund of premiums attributable to active duty time and guarantees reinstatement of insurance at termination of active duty.
  
  - (4) Applies to Reserve Component Attorneys called to active duty in support of Kosovo Operations under 10 USC Sections 12301(d) [Volunteers] or 12304 [PSRC]. See Reserve Component Note, "Professional Liability Protection for Attorneys Ordered to Active Duty", The Army Lawyer, August 1999, at p. 44.

- e) Added 50 U.S.C. App. § 593 - Reinstatement of Health Insurance Coverage upon release from Service.

## **II. ARTICLE I - GENERAL PROVISIONS OF THE SSCRA.**

- A. Purpose: The Purpose of the Act is to postpone or suspend some of the civil obligations of military personnel to allow them to give full attention to their military duties. The Act should be read "with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).
- B. Constitutionality: The SSCRA is constitutional. Although it arguably interferes with the administration of justice within the states, courts have found that this interference is permissible as an exercise of Congress' power to raise and support the military forces under Article I, § 8 of the Constitution. *See, e.g., Radding v. Ninth Fed. Sav. & Loan Assoc.*, 55 F. Supp. 361 (D.C. N.Y. 1944).
- C. Protected Persons .
  - 1. Active Duty.
  - 2. Reserves while in active federal service.
    - a) Annual Training - applicable due to language of the Act - The term "person in the military service" includes "... federal service on active duty with any branch of service heretofore referred to... (§ 511) "... and any member of a reserve component of the Armed Forces who is ordered to report for military service shall be entitled to such relief and benefits...." (§ 516).

- b) In re Brazas, 662 N.E.2d 559 (Ill. 1996). Trial court abused its discretion by holding a hearing on divorce case issue when judge and opposing counsel were aware defendant on Reserve Active Duty for Training (ADT) status. *See also* Min v. Avila, 991 S.W.2d 495 (Tex. App. 1999) (SSCRA tolling provision applies to Reserve Component members on active duty status, but not drill status).
  - 3. National Guard - Only if in active federal service.
    - a) DAJA-AL 1991/1884 21 June 1991 - State national guard personnel on full-time state duty are not covered by SSCRA.
    - b) Research Tip - Do not overlook state protections such as LA Rev. Stat 29: §§ 401-425, and PA. Code Vol. 51, PA-C.S.A. §§ 7309-7316 (2000) which provide similar relief to military persons in state service.
  - 4. Dependents - For Article III protections - protection available in their own right (other protections may be derivative).
  - 5. Others - sureties, guarantors, etc. - 50 U.S.C. App. § 513.
- D. Period of Coverage.
- 1. Commencement.
    - a) Active Duty - date of entry.
    - b) Inductees - date of receipt of orders.
    - c) Reserve Components - date of receipt of orders for Articles I-III, date of reporting for all other protections.
  - 2. Termination.

- a) Ordinary - Date of discharge terminates some coverages. Some protections extend for a limited time beyond discharge but are tied to discharge date.
  
- b) Misconduct.
  - (1) Court-Martial - Soldier serving sentence for violent assault has divested himself or herself of protections of the Act. *Mantz v. Mantz*, 69 N.E. 2d 637 (Ohio C.P. 1946).
  
  - (2) AWOL - Depends on reasons for AWOL.
    - (a) Soldier who "extended furlough" to attend birth of child still entitled to protection. *Shayne v. Burke*, 27 So.2d 751 (Fla. 1946).
  
    - (b) Soldier AWOL with whereabouts unknown not entitled to SSCRA protection. *Harriott v. Harriott*, 511 A.2d 1264 (N.J. 1986), and *U.S. v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), *related case*, *Marriage of Hampshire*, 934 P.2d 58 (Kan. 1997).
  
    - (c) Self-inflicted injury. Marine who was hospitalized as a result of a self-inflicted gunshot wound not entitled to use SSCRA to stay judicial proceedings. *Burbach v. Burbach*, 651 N.E.2d 1158 (Ind.App., 1995).
  
- c) Waiver.
  - (1) Written [50 U.S.C. App. Section 517].



- (2) Executed after effective date of coverage.
- (3) Specific - Waiver of one provision does not waive others. *See Harris v. Stem*, 30 So.2d 889 (LA Ct. App. 1947). Court held that waiver of rights against seizure of property did not affect tolling of statute of limitations.

### 3. Jurisdiction .

- a) Applies in all courts in United States.
- b) Collateral review of state decisions in federal court? - NO - *Shatswell v. Shatswell*, 758 F. Supp 662 (D. Kan. 1991). *See also Scheidegg v. United States*, 715 F. Supp. 11 (D. N.H. 1989)(SSCRA is not a grant of subject matter jurisdiction to seek review of state court decisions in federal court).
- c) Private Cause of Action ? - Generally no independent cause of action for SSCRA.
  - (1) *United States v. Bomar*, 8 F. 3d 226 (5th Cir. 1993). United States Attorney pursued criminal sanction for violation of Act.
  - (2) U.S. Department of Justice Memorandum to Department of Defense General Counsel on SSCRA Representation, 12 March 1991 (unpublished).
  - (3) *McMurtry v. City of Largo*, 837 F. Supp. 1155 (M.D. Fla. 1993). No federal cause of action for federal jurisdiction. Soldier's failure to use remedy under SSCRA does not permit later cause of action to retrieve the lost remedy.

(4) Use the remedy of the SSCRA in the applicable action or combine it with other causes of action as an equitable argument. *Garramone v. Romo, et. al.*, 94 F.3d 1446 (10th Cir. 1996) (plaintiff may assert SSCRA rights as part of a civil rights action under 42 U.S.C. Section 1983.)

d) Private Cause of Action for 6% Interest Cap Cases-SSCRA?  
Yes!!

(1) *Moll v. Ford Consumer Finance Company, Inc.*, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998) (unpub). A district court has held that the 1991 Amendments to the SSCRA [?518(2)(B)] create a private cause of action for recouping interest charged above the 6 % interest cap [?526]. *Accord, Marin v. Citibank, N.A.*, 208 F.3d 203 (2d Cir. 2000).

(2) See Appendix D, Conrad, Note, "Federal Court Rules That Military Members Have a Private Cause of Action Under the Soldiers' and Sailors' Civil Relief Act", *The Army Lawyer*, July 1998, at 63.

### **III. ARTICLE II - GENERAL RELIEF (50 U.S.C. APP. §§ 520-527).**

A. Key Concept - Material affect requires a showing that the service member's military service has materially affected the service member's ability to fulfill the civil obligation.

B. 6% Interest Cap (50 U.S.C. App. § 526).

1. Limits interest to 6% for duration of military service.

2. Criteria.

a) Applies only to obligations incurred before entry onto active duty.

- b) Service member now on active duty, and,
  - c) Military service materially affects ability to pay. Fed. Home Loan Mortgage Corp. v. Sincaban (unpublished) (U.S. Dist. Ct. W. D. WI. Order # 93-C-0090-C 13 Dec 93). Reserve doctor called to AD with reduced income. Creditor bank discovered she had substantial investment income in millions - HELD - no material affect. Judge indicates that creditors may look at the “totality of circumstances” to determine material affect, including spouse’s income, and accumulated assets.
  - d) Effective at entry on active duty/notice of activation.
- 3. Notice to lender. [Sample Letter to Lender at Appendix A.]
  - a) With copy of orders.
  - b) Burden. On lender to seek relief in court if lender asserts no material affect
- C. Issue of how to implement 6% reduction.
  - 1. Various asserted methods.
    - a) Forgive all interest above 6% (DOD/DOJ position).
    - b) Reduce rate but not payment. [This ploy was discouraged by the Comptroller of the Currency. See Advisory Memo, 1991 OCC CB LEXIS 13 (1991).]
    - c) Add interest above 6% to loan balance.
  - 2. DOD/DOJ position adopted during Desert Shield/Storm by national lending associations. [Joint Hearing before the House and Senate Veteran Affairs Committees on SSCRA, 101st Cong., 2d Sess. (12 Sep. 1990), as reported in The Army Lawyer, p. 50, Nov. 1990.]

3. SSCRA does not apply to federally guaranteed student loans (according to DOE interpretation).
    - a) Title 20, U.S. Code Section 1078(d). Federally insured student loans are not subject to any interest rate limits. Memorandum, Department of Education (DOE), to the Office of the Staff Judge Advocate, Camp Lejeune, North Carolina (1 April 1993); DOE Memorandum, GSL Borrowers Adversely Affected by the Recent U.S. Military Mobilizations (29 August 1990).
    - b) Military deferments are no longer granted for student loans, but soldiers may have loan payments deferred up to six months or more for economic hardship upon request to lender/DOE IAW 34 C.F.R. § 682.211.
  4. *See also* United States ex. rel. Bennett v. American Home Mortgage, (D. N.J.) (unpublished) (settled out of court after U.S. Attorney initiated suit on behalf of service member against lender that refused to lower payment).
  5. Responses to Creditor Refusal to honor 6% interest provision. Pottorff, James P., “*Contemporary Applications of the Soldiers’ and Sailors’ Civil Relief Act*,” 132 MIL. L. REV. 115 (1991).
  6. Moll v. Ford Consumer Finance Company, Inc., 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998) (unpub.). *Accord*, Marin v. Citibank, N.A., 208 F.3d 203, 2000 U.S. App. LEXIS 10345 (2d Cir. 2000). Military members may file private cause of action to enforce the 6% interest cap provision of 50 U.S.C. App. § 526.
- D. Stay of Proceedings (50 U.S.C. app. § 521).
1. Who.
    - a) Both military plaintiff and defendant may request.

- b) But not plaintiff's attorney if the attorney is the person called to active duty. *Salazar v. Rahman*, 1993 WL 22085 (Tex. Ct. App. 1993)(unpublished).
- c) Not if a service member is a material witness - not a party. *Ohio v. Gall*, 1992 WL 217999 (Ohio Ct. App. 1992)(unpublished).

2. What Proceedings.

- a) Civil Court Hearings.
- b) Bankruptcy Debtor/ Creditor Meeting ?- Yes - In re *Ladner*, 156 B.R. 664 (Bankr. D. Colo., 1993).
- c) Administrative Hearing? No. ISSUE: The new Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325,363, 110 Stat. 2105 (1996), requires states to set up administrative proceedings to expedite handling of child support and paternity claims which are not subject to SSCRA stay protection. Drafters ignored DoD request to include SSCRA stay protections for such hearings.

3. When may you request a stay? Soldier may make the request at any stage of the proceedings. ISSUE: What is the impact of the Internet, video conferencing, video depositions on determinations of unavailability?

- a) *But see Massey v. Kim*, 455 SE2d 306 (Ga. Ct. App. 1995) (Military defendant seeks stay to delay civil discovery until completion of overseas tour. Court rejects request, pointing out improvements in modern communications since the passage of the SSCRA.);
- b) *Keefe v. Spangenberg*, 533 F.Supp. 49 (W.D. Okla. 1981) (Court denies stay request to delay discovery and suggests that service member agree to video tape deposition, IAW Fed. R. Civ. P. 30(B)(4)); and

- c) In re Diaz, 82 B.R. 162, 165 (Bankr. Ga. 1988) (“Court reporters may take depositions in Germany including videotape depositions for use in trials in this country.”).
- 4. Duration of stay - Period of service plus 60 days. Key = Reasonableness!! Keefe v. Spangenberg, 533 F.Supp. 49, 50 (W.D. Okla. 1981). Court grants soldier stay request for a one month continuance, but denies soldier request for a stay until his expected date of discharge three years later.
- 5. Burden of Proof - Boone v. Lightner, 319 U.S. 561 (1943) - at discretion of trial court.
  - a) As a practical matter - assume the burden is on the service member to show service has materially affected the ability to appear in court.
  - b) Military member must show material affect:
    - (1) Unavailability to Appear [no ability to take leave]:  
ISSUE: The new Welfare Reform Act of 1996 requires that the military services must promulgate regulations to facilitate the granting of leave for service members to appear in court and administrative paternity and child support hearings. *See* Pub. L. No. 104 - 193, § 363(b), 110 Stat. 2105 (1996); DOD Directive 1327.5, Leave and Liberty (IO 4, 10 Sep. 1997). *See also* Conrad, Note, "Child Support and Paternity Case Stay Actions Impacted by the Welfare Reform Act of 1996", The Army Lawyer, June 1998, at 13. [Appendix C].
    - (a) Unsuccessful.

- (i) Hibbard v. Hibbard, 431 N.W.2d 637 (Neb. 1988) - Court affirms adverse judgment against overseas soldier where soldier failed to use 38 day leave stateside to resolve pending support modification action.
  - (ii) Underhill v. Barnes, 288 S.E. 2d 905 (1982). Soldier made no showing of attempt to request leave, court took judicial notice of leave statutes and regulations and assumed he had 50 days accrued based on leave accrual and length of service.
  - (iii) Palo v. Palo, 299 N.W. 2d 577 (S.D. 1980) - Both parties were service members assigned to Germany. Wife took excess leave and emergency loan to travel to United States for divorce hearing. Husband made no showing of inability to do the same.
  - (iv) Rogers v. Tangipahoa Parish Sheriff's Office, 1997 WL 466922 (E.D. La. 1997); Bowman v. May, 678 So.2d 1135 (Ala. Civ. App. 1996); and Judkins v. Judkins, 441 S.E.2d 139 (N.C. 1994). (Soldier must make an actual showing of unavailability, including an effort to obtain leave. No showing and stay request denied.)
- (b) Successful.

- (i) Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (Sailor deployed at sea sends affidavit from superior officer attesting to inability to appear or take leave for a limited period because of military sea duty.)
  - (ii) Cromer v. Cromer, 278 S.E.2d 518 (N.C. 1981) (Sailor deployed on nuclear submarine has letter and affidavit from commander attesting to his inability to take leave until the submarine got to port.)
- (2) Actual Prejudice resulting from Non-Appearance.
  - (a) Sole issue at trial-uncontested facts = NO STAY.
    - (i) Real Property Valuation. Cooper v. Roberts, 722 S.W.2d 910 (Ky. Ct App. 1987).
    - (ii) Child Support Determination based upon income formula, where income is not disputed, or by Revised Uniform Reciprocal Enforcement of Support Act. Jaramillo v. Sandoval, 431 P2d 65 (N.M. 1967); 42 U.S.C. §§ 651-667 (1990); State *ex. rel.* Adams v. Adams, 455 N.W.2d 227, 230 n.2 (S.D. 1990)[RURESA]; *But see* Schmidt v. Schmidt, 444 NW2d 367, 372-73 (S.D. 1989) (Henderson, J., dissenting).
    - (iii) Uncontested Divorce Hearings. Palo v. Palo, *supra*.



- (iv) Appeal of Judgment. Kesler v. Kesler, 682 S.W.2d 44, 45 n.1 (Mo. Ct. App. 1984).
- (b) Service Member not Real Party in Interest = NO STAY.
  - (i) Tort Liability-Soldier Defendant Insured
    - (a) Boone v. Lightner, 319 U.S. 561, 569 (1943).
    - (b) Underhill v. Barnes, 288 S.E.2d 905, 907 (Ga. Ct. App. 1982) (Service Member defendant not prejudiced where plaintiff has agreed to limit tort recovery to insurance policy limits.)
    - (c) Hackman v. Postel, 675 F.Supp 1132 (N.D. Ill. 1988) (Service member is only nominal defendant in personal injury action, and insurance company may not assert the SSCRA.)
  - (ii) Subrogation Cases. Murphy v. Wheatley, 360 F.2d 180 (5th Cir. 1966).
  - (iii) Custody Cases-Not a Necessary Party. --Bubac v. Boston, 600 So.2d 951 (Miss. 1992) (military father not necessary party in proceeding by mother challenging retention of kids by paternal grandmother).

- (iv) Temporary Modification of Support. -- Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989). As general rule, temporary modifications of child support do not materially affect rights of military defendant as they are interlocutory and subject to modification.
- (c) Service member bad faith = NO STAY.
  - (i) Riley v. White, 563 So.2d 1039 (Ala. Civ. App. 1990) (soldier failed to submit to blood test in paternity action before going overseas, when aware of court proceedings, had attorney representation, and was previously given a delay by court to take test, denied stay).
  - (ii) Hibbard v. Hibbard, 431 NW2d 637 (Neb. 1988) (soldier for three years in contempt of court for refusing to comply with visitation orders of court, denied stay in ex-spouse's change of custody action).
  - (iii) Judkins v. Judkins, 441 S.E.2d 139 (N.C. 1994) (soldier receives several continuances because of military duty during Persian Gulf war, has attorney, fails to comply with court discovery orders, and seeks additional stay/continuances after discovery order disobedience).
- (3) What Type of Cases WILL courts find actual prejudice/material affect for SSCRA Stay?

- (a) Personal Injury Claims-Plaintiff/Actual Defendant. *Starling v. Harris*, 151 S.E.2d 163 (Ga. Ct. App. 1966) (soldier only eyewitness to tort other than other party).
- (b) Large Financial Disputes. *Mays v. Tharpe & Brooks, Inc.*, 240 S.E.2d 159 (Ga. Ct. App. 1977) (service member sued on guaranty on \$50,000 promissory note; stay granted).
- (c) Contested Divorce, Custody, Paternity Cases.
  - (i) *Smith v. Smith*, 149 S.E.2d 468, 471 (Ga. 1966) (error to deny stay in divorce action where alimony at issue).
  - (ii) *Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981) (change of child custody action involving service member's children, while he was unavailable to defend and had requested a stay, reversed).
  - (iii) *Mathis v. Mathis*, 236 So.2d 755 (Miss. 1970) (service member's absence in paternity action materially affects ability to defend, unless specific findings made otherwise).
- (4) Court discretion - if court finds material affect, the court must order a stay. If the stay request is denied, the court must make findings of fact about lack of material affect, or ensure that there is sufficient evidence in the record to warrant denial. *Olsen v. Olsen*, 621 N.E.2d 830 (Ohio 1993).

6. Default Judgments (50 U.S.C. app. § 520).

a) Affidavit.

- (1) Must be prepared and filed by plaintiff.
- (2) Must state sufficient facts to give court reasonable basis to determine whether the respondent is in the military. *Mill Rock Plaza Associates v. Lively*, 580 N.Y.S.2d 815, 153 Misc.2d 254 (N.Y. City Civ. Ct. 1990).
- (3) Effect of failure to file.
  - (a) No entry of judgment until judge determines that the defendant is not in the military and has not requested a stay. *But see* *Interinsurance Exchange Auto. Club v. Collins*, 37 Cal. Rptr.2d 126 (Cal. App. 1994)(clerk of court may not refuse to enter a default judgment because no SSCRA affidavit is filed with the pleadings).
  - (b) Remedy is not available to persons who are not in the military!
  - (c) Judgment obtained without affidavit is voidable, not void.
  - (d) False affidavit subject to criminal penalties. 50 U.S.C. App. § 520(2).
- (4) Court-Appointed Attorney.
  - (a) Purpose. Ascertain whether the defendant is in the service and if so to request a stay on the defendant's behalf. *See State ex rel. Burden v. Smith*, 1994 WL 714505 (Ohio App. 10 Dist., 22 Dec. 1994) (unpublished).

- (b) Compensation: No specific provision in SSCRA - look to state attorney appointment and compensation powers.
- (c) Effect of failure to appoint. Most cases, no sanctions against judge and failure to appoint is not an abuse of discretion or reversible error unless respondent can show he was prejudiced by the failure to appoint counsel. Marriage of Lopez, 173 Cal. Rptr. 718 (Ca. App. 1981); McDaniel v. McDaniel, 259 S.W.2d 633 (Tex. Civ. App. 1953) (prejudicial error to approve judgment in child support modification case contested by the parties, without determination that party to action was in the military).
- (d) Judgment obtained without appointment is also only voidable, not void.
- (e) Recent cases: Civil Court appoints military SJA to serve as SSCRA counsel (San Diego Naval Station and Fort Stewart, GA). How to respond?
  - (i) Civil court has no jurisdiction over military attorney, unless a member of that state's bar.
  - (ii) Conflict of interest for SJA to represent an individual service member when the SJA is obligated to represent the military command by regulation.
  - (iii) State law (CA) requires permission of the military service Judge Advocate General for an SJA to represent an individual service member. [Check State Law.]

7. Reopening Default Judgments, 50 U.S.C. App. § 520(4).
- a) Judgment must have been entered during term of service or within 30 days after termination of service.
  - b) Application must be made to court during term of service or within 90 days of termination.
  - c) The service member cannot have made any appearance.
- (1) Filing an answer either pro se or through counsel is an appearance.
  - (2) Letter from Legal Assistance Attorney to court may be an appearance! **Don't Let Your Legal Assistance Attorneys File SSCRA Stays with a civil court!! See SSCRA Note, "Legal Assistance Attorney Asserts a SSCRA Stay and is Found in Contempt of Court", The Army Lawyer, March 1999, at p. 32.**
- (a) Skates v. Stockton, 683 P.2d 304 (Ariz. Ct. App. 1984) (even though court did not otherwise have personal jurisdiction, it determined that legal assistance attorney's letter requesting a stay constituted an appearance sufficient to give it personal jurisdiction; attorney failed to reserve defenses including jurisdiction).

- (b) *Artis-Wergin v. Artis-Wergin*, 444 N.W.2d 750 (Wis. Ct. App. 1989) (legal assistance attorney requested a stay, but did not invoke SSCRA in request; court determined defendant had made an appearance and refused to reopen subsequent default judgment). *But see* *Kasubaski v. Kasubaski*, 1996 Wis. App. LEXIS 1014 (Wis. Ct. App. 1996) (unpublished) (court criticizes the reasoning of *Artis-Wergin*, and suggests it was wrongly decided).
  - (c) *But see* *Kramer v. Kramer*, 668 S.W.2d 457 (Tex. Ct. App. 1984); *Marriage of Lopez*, 173 Cal. Rptr. 718, 721 (Ca. App. 1981) (appellate courts hold that defendant's letter or legal assistance attorney letter invoking SSCRA and requesting a stay did not provide personal jurisdiction that was otherwise lacking).
- (3) There is hope - some things are not appearances!
  - (a) Letter from Commander to court. *Cromer v. Cromer*, 278 S.E.2d 518 (N.C. 1981) (court does not explicitly rule on re-opening under the SSCRA, but does remand case "in the interests of justice").
  - (b) Letter to opposing counsel. *Sacotte v. Ideal-Werk Krug*, 359 NW2d 393 (Wis. 1984). (letter to opposing counsel asserting SSCRA does not constitute an appearance). Opposing counsel has a duty of candor towards a tribunal.
    - (i) ABA Model Rule of Professional Conduct 3.3(d):

*In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.*

- (ii) Failure to report SSCRA stay request subjects opposing counsel to disciplinary action for professional responsibility violation.
- (c) Sample SSCRA letters to opposing counsel and for Commanders to assert stay at Appendix A.
- (d) SSCRA stay request is not an improper *ex parte* communication to a court, but a federally allowed *ex parte* communication. [Avoid the issue by having the commander send a copy of the stay request to opposing counsel.]
- (e) SSCRA stay request is not an illegal ghost pleading under the Iowa Rules of Professional Responsibility. *See* Iowa Board of Professional Ethics and Conduct Opinions 94-35 (May 23, 1995) and 96-7 (Aug. 29, 1996) (Iowa military attorneys may not prepare pleadings for military clients for jurisdictions where they are not admitted to practice or have been approved by local court motion to appear *pro hac vice*).
- (f) Commanders requesting an SSCRA stay for a soldier, or legal assistance attorneys assisting a commander with such a request are not conducting unauthorized practice of law.



- (i) Section 521, U.S. Code provides in part that a stay request may be presented by the plaintiff or defendant "*or someone on his behalf.*" The legislative history of the SSCRA makes clear that non-lawyers may make such requests to a civilian court pursuant to federal law.
  - (ii) Federal law permits non-lawyers to represent individuals in specific instances, and that law must be obeyed in state courts. *See* Del. Bd. On Unauthorized Practice of Law, Nol UPL-91-16 (1991) (paralegal's representation of individual before Delaware health agency pursuant to federal regulations does not constitute unauthorized practice of law. Board may not take action contravening express federal regulations or statutes).
- d) Criteria to re-open default.
  - (1) Military service prejudiced ability to defend, AND
  - (2) Meritorious Defense - Defendant must reveal the defense to all or part of the original action.
  - (3) Good Example. *Hawkins v. Hawkins*, 999 S.W.2d 171, 1999 Tex. App. LEXIS 6362, (Tx. App. 1999) (SM unable to take leave to defend in divorce action overturned default judgment of civil court that declared his paternity of two children of his estranged wife without any DNA test, child support for said children, and miscalculated his military retirement benefits division upon divorce. SM's situation showed clear prejudice, and he had a meritorious defense to the default divorce judgment).

8. Stay or Vacation of Judgments, Attachments & Garnishments (50 U.S.C. § 523).
  - a) Military service materially affects ability to comply with judgment, court-ordered attachment, and/or garnishment, e.g. child support orders.
  - b) Court may stay execution of any judgment or court order entered against service member. Court may vacate or stay any court-ordered attachment or garnishment of property, wages, or money in the hands of another either before or after judgment. ISSUE: Administratively determined involuntary allotments for child support arrears enforcement not subject to this provision. See 42 U.S.C § 665; 5 C.F.R. § 581.302(b)(4); 32 C.F.R. § 584.9; 32 C.F.R. Part 541 (1996); and Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325, 363, 110 Stat. 2105 (1996).
  - c) DFAS, which processes all military garnishment requests for support orders, has rarely seen this SSCRA provision asserted by military members or legal assistance counsel.
9. Assessing the default judgment case:
  - a) Can you afford to do nothing?
  - b) Material affect and meritorious defense?
  - c) Adverse action from default - garnishment or involuntary allotment? [Involuntary Allotment of military pay affects only RC soldiers on active duty > 180 days. DOD Dir. 1344.9, and DOD Instr. 1344.12.]

## **IV. INVOLUNTARY ALLOTMENTS AND THE SSCRA.**

### **A. HATCH ACT REFORM AMENDMENTS - 1993.**

1. Law prior to 1993 - Sovereign immunity prevented garnishment of federal employee pay except for family support. *See, e.g., Omega v. Koller*, 503 F. Supp. 149 (D.C. Md. 1980) (consumer Credit Protection Act held not a specific waiver of sovereign immunity for garnishment).
2. Garnishment Equalization Act - Introduced as S. 316 in 101st Congress (Chief sponsor - Sen. Craig). Reintroduced as S. 253 in 102d Congress. Merged into Hatch Act Reform Amendments, P.L. 103-94; signed by President on October 11, 1993. Now codified at 5 U.S.C. § 5520a.
  - a) Waived sovereign immunity for civilian federal employee pay.
    - (1) Estimated annual defaulted debt of federal employees \$1.3 Billion.
    - (2) Estimated number of federal employees with defaulted debt based on Postal Service experience - 2% of federal workforce, including military.
  - b) Directed DoD to promulgate regulations providing for involuntary allotment of military pay to account for "the procedural requirements of the Soldiers and Sailors Civil Relief Act...and in consideration for the absence of a member of the uniformed services from an appearance in a judicial proceeding resulting from the exigencies of military duty."

B. INVOLUNTARY ALLOTMENTS FOR CREDITOR JUDGMENTS - DOD  
DIRECTIVE 1344.9; DOD INSTRUCTION 1344.12.

1. Initiation Procedure.
  - a) Final order of court with specific money award, and DD Form 2653.
  - b) Served on designated agent - DFAS - Cleveland.
2. Certifications [DD Form 2653]:
  - a) Judgment not modified or set aside.
  - b) Not issued while service member was on active duty. If the service member was on active duty, the SSCRA was followed fully.
  - c) State law allows garnishment of a similarly situated civilian.
  - d) Debt has not been discharged in bankruptcy or barred by other legal impediment.
  - e) Creditor agrees to repay service member within 30 days if payment to creditor is erroneous.
  - f) DFAS Information Sheet- Appendix C.
3. Amounts Available.
  - a) Pay includes - Disposable (generally taxable) pay only.

- b) Maximum amount of allotment - 25% of disposable pay or lower if state law provides for lower amount. The states of NC, SC, NH, PA, TX do not allow garnishment of wages for commercial debts, thereby precluding involuntary allotment actions from debt actions in those states.
  - c) Creditors now charged a \$75 processing fee out of their 25% pay allotment per the DoD Authorization Act of Fiscal Year 1996, Pub. L. No. 104-106, § 643, 110 Stat. 368, codified at 5 U.S.C. §§ 5520a (j)(2), (k)(3), and (l) [1996]. *See also* 61 Fed. Reg 53722 (15 Oct. 1996). This provision is often contested by creditors, as DoD is the only federal agency to deduct fees from the judgment amount.
4. DFAS action.
- a) Facial review.
  - b) Mail notice [DA Form 2653] to service member [90 day clock starts].- No time limit for DFAS to issue notice. Mail two additional copies to the "immediate commander" with DD Form 2654.
5. Command action ("Immediate Commander").
- a) Serve service member with copy of notice and DD Form 2654 (Rights Warning Form) [5 day req.]
  - b) Inform service member of rights to contest the involuntary allotment [15 days to respond].
  - c) Grant 30 day extension to respond if necessary. No response back to DFAS within 90 days from initiation of process results in automatic involuntary allotment.

6. Service member's actions.
  - a) Consent.
  - b) Seek legal assistance.
7. Service member defenses:
  - a) The SSCRA was not followed in the underlying judgment.
  - b) Military exigency caused the absence of the service member from appearance in a judicial proceeding that forms the basis of the judgment.
  - c) The application for allotment is false or erroneous in material part.
  - d) The judgment has been satisfied, set-aside, or modified.
  - e) A legal impediment (e.g. bankruptcy) prevents processing the allotment.
  - f) "Other appropriate reasons..." Violation of consumer law-underlying judgment.
8. Immediate Commander Response.
  - a) Rule on military exigency defense only.
    - (1) Standard of review - preponderance.

- (2) Definition - "[M]ilitary assignment or mission essential duty that, because of its urgency, importance, duration, location or isolation, necessitates the absence of a member of the military service from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally to be presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed."
- b) Provide name and address of appellate authority for military exigency appellate determination by creditor.
  - c) Forward debtor response to DFAS. Debtor failure to timely respond results in automatic initiation of involuntary allotment.
- 9. DFAS decides all other defenses, except military exigency. No appeal of DFAS determinations.

## **V. SUSPENSION OF STATUTES OF LIMITATION (50 U.S.C. APP. § 525).**

- A. Tolls the running of the statutes.
  - 1. During the service person's period of service;
  - 2. With respect to civil and administrative proceedings;
  - 3. Involving the service member as either plaintiff or defendant;
  - 4. Except for the internal revenue laws! 50 U.S.C. App. § 527.

B. Issues.

1. Career Military - *Conroy v. Aniskoff*, 507 U.S. 511, 113 S. Ct. 1562, 123 L.Ed.2d 229 (1993).
  - a) The tolling applies regardless of whether the service member is inducted, volunteers, is a one-termer or a career military member.
  - b) In addition, court held no requirement to show material affect.
2. Does "all proceedings" mean all?
  - a) Board for Correction of Military Records - tolled. *Detweiler v. Pena*, 38 F. 3d 591 (D.C. Cir. 1994) ("any" means "any"). *Detweiler* overrules other case law that indicated the BCMR statute was not tolled. *See Allen v. Card*, 799 F. Supp. 158 (D.C. 1992) (pre *Conroy*); *Miller v. United States*, 29 Fed.Cl. 107 (1993)(post *Conroy*). Department of Defense requested a legislative override of *Detweiler*, which was included in the FY 1997 DoD Authorization Act bill, but was deleted in conference committee.
  - b) Merit Systems Protection Board – tolled. *See Davis v. Dep't of the Air Force*, 51 M.S.P.R. 246 (1991).
  - c) Bankruptcy – tolled. *See In re A.H. Robins v. Dalkon*, 996 F.2d 716 (4th Cir. 1993). "The statute contains no exceptions and is drafted in extraordinarily broad terms...The broad, unqualified and mandatory language of section 535 leaves little room for judicial interpretation...." *Id.* at 718.
3. Laches. The SSCRA provision does not prevent assertion of the equitable principle of laches. *See Detweiler v. Pena*, 38 F 3d 591, 595 (D.C. Cir. 1994). Laches = inexcusable delay by petitioner plus prejudice to respondent's ability to defend.



**VI. ARTICLE III - RENT, LEASES, INSTALLMENT CONTRACTS,  
MORTGAGES, LIENS AND ASSIGNMENTS (50 U.S.C. APP. §§ 530-536)**

- A. Protected Persons - Active Duty personnel and dependents in their own right.
- B. Protection from Eviction from Leased Housing (50 U.S.C. App. § 530).
  - 1. Premises occupied - must be a dwelling place of the service member or dependents.
  - 2. Rent may not exceed \$1200 per month. - changed from \$150 by Desert Shield/Storm amendments.
  - 3. Judicial Relief Available. Court shall upon application of service member or eligible dependent, and may, on its own motion grant the following:
    - a) Stay of eviction proceedings for up to 3 months; or,
    - b) Make any other "just" order.
    - c) Unless the court finds no material affect.
    - d) Criminal Sanctions for Landlord "self-help" eviction.
- C. Termination of Pre-Service Leases (50 U.S.C. App. § 534).
  - 1. Purpose: to permit lawful termination of a pre-service lease of premises by a service member entering active duty [or by his or her dependent in their own right (see § 536)].
  - 2. Criteria for relief.
    - a) The service member need NOT show material affect.

- b) The service member need only show:
  - (1) The lease was entered into prior to entry into military service;
  - (2) The lease was executed by or on behalf of the service member;
  - (3) The leased premises were occupied for dwelling, professional, business, agricultural, or similar purposes by the service member or the service member and his or her dependents; and
  - (4) The service member is currently in military service.
- c) Landlord may seek “equitable offset” for unreasonable costs/expenses incurred as the result of early military tenant termination, e.g., realty fees, cost of special fixtures installed at tenant request, etc. Such landlord equitable offset may be greater than the amount of tenant rent and security deposit remaining under the lease term. *Omega Industries, Inc., v. Raffaele*, 894 F.Supp. 1425 (D. Nev. 1995). *See also* Conrad, Note, *Pre-Service Lease Terminations May Be Subject to Landlord "Equitable Offsets"*, *The Army Lawyer*, April 1997, at 153.

## **VII. INSTALLMENT CONTRACTS AND AUTO LEASES (50 U.S.C. APP. § 531).**

- 1. Applies only to **pre-service obligations** by either service member or spouse who can show material affect as to ability to pay on installment contracts such as appliances, furniture, and motor vehicles.
- 2. Prohibits self-help repossession of items purchased on installment contract.

- a) Leased automobiles or other items included if option to purchase clause in lease agreement.
  - b) SSCRA does not terminate automobile leases!
- 3. Criminal penalties for violating repossession provisions of this section.
- 4. Upon service member showing of material affect to a court a stay may be granted and the creditor may only seek repossession of the item purchased on installment contract by obtaining a court order after obtaining a judgment on the debt.
- 5. Practice Pointer in Auto Lease Cases: While you may not threaten criminal action to settle a civil matter, you may point out any potential violations of this section to a creditor or their counsel (self-help repossession), and suggest a possible settlement of the matter, allowing the soldier to voluntarily surrender the vehicle in return for the creditor waiving all early lease termination penalties.

### **VIII. ENFORCEMENT OF STORAGE LIENS (50 U.S.C. APP. § 535).**

- A. General: Persons with storage liens on property of service members may not exercise any right to foreclose or enforce any lien during the service member's period of military service and for three months thereafter except upon court order.
- B. Judicial Relief.
  - 1. Court shall (upon application by service member) and may upon its own motion,
    - a) Stay proceedings, or
    - b) Grant other equitable relief to conserve interests of all parties.

- c) Unless there is no "material affect" (if the service member's ability to pay the storage charge is not materially affected by service).
- C. Criminal Sanctions. Any person who knowingly takes any action contrary to this section, or attempts to do so, shall be fined as provided in 18 U.S.C., or imprisoned for not to exceed one year, or both. 50 U.S.C. app. § 535(3). *See* United States v. Bomar, 8 F.3d 226 (5th Cir. 1993). [Note that the United States prosecuted criminally this case on behalf of the soldier].

## **IX. MORTGAGES, TRUST DEEDS, ETC. (50 U.S.C. APP. § 532).**

- A. In court actions to enforce mortgage obligations, court shall, on application by service member, and may, upon its own motion, grant relief to service member [or dependent pursuant to § 536] unless military service does not materially affect ability to comply with obligation.
- B. Criteria for relief.
  - 1. Obligation is secured by a mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property;
  - 2. Obligation entered before entry into military service;
  - 3. Property owned by service member [or dependent] before entry into military service;
  - 4. Property is still owned by service member or dependent at time relief is sought; and
  - 5. Military service materially affects ability to comply with terms of obligation, such breach occurring prior to or during period of such military service.
- C. Judicial relief:

1. Court shall, on application by service member, and may upon its own motion:
  - a) Stay proceedings; and/or
  - b) Grant other equitable relief to conserve interests of all parties (i.e., reduce or suspend installment payments);
  - c) Unless there is no "material affect."
2. No sale, foreclosure, or seizure of property shall be valid if made during the period of military service or within 3 months thereafter, except pursuant to an agreement (§ 517), unless upon an order previously granted by the court and a return thereto made and approved by the court.

**X. ARTICLE VII - FURTHER RELIEF [50 U.S.C. APP. § 590].**

**A. Stay of Enforcement of Obligations, Liabilities, Taxes (50 U.S.C. App. § 590).**

1. Person may, at any time during military service or within 6 months thereafter, apply to court for relief of any obligation or liability incurred by such person prior to active service or in respect to any tax or assessment whether falling due prior to or during active military service.
2. Court may grant stays of enforcement during which no fine or penalty shall accrue if service materially affected ability to comply with obligation or pay tax or assessment.
  - a) There need be no default or legal action pending to get protection, but applicant must prove "material affect." Application of Marks, 46 N.Y.2d 755 (1944).
  - b) Dependents receive protection. Morris Plan Indus. Bank of N.Y. v. Petluck, 60 N.Y.2d 162 (1946).

- B. Real World Problem : Reserve soldier (physician) had pre-service BMW auto lease which he could not afford while on active duty during Desert Storm. He voluntarily gave the vehicle back to the dealer. After he returned from Desert Storm, the dealer sued him for a \$31,000 deficiency. What should the soldier have done prevent this? He should have used § 590 to get prospective relief from the lease obligation.

## XI. CONCLUSION

### **SIGNIFICANT SSCRA PROVISIONS**

<u>SSCRA Provision</u> .*	<u>Pre-Service Obligation</u>	<u>Service Obligation</u>	<u>Post-Service</u>
6% Interest Cap [Section 526]	Yes.	No.	No.
Civil Court Stay [Section 521]	No.(Only applies Active Duty)	Yes.	Yes. Up to 60 days
Reopen Judgment [Section 520(4)]	No.	Yes.	Yes. Judgments up to 30 days from discharge. Reopen up to 90 days from discharge.
Toll Statute of Limitation [Section 525]	No.	Yes. Civil & Admin Actions.	No.
Eviction Protection [Section 530]	No.	Yes. Rent<1200/mo	No.
Termination of Lease [Section 534]	Yes. Residential, Commercial/Prof.	No.	No.
Mortgage Foreclosure [Section 532]	Yes. Obligation was pre-service	.	No. No.
Storage Liens Protection	Yes.	Yes.	Yes. Up to 3 [Section 535(2)] months from discharge.
Installment Contract/ Auto Leases [Section 531]	Yes. (Pre-service only)	No.	No.
Anticipatory Relief [Section 590]	Yes. (Pre-service obligation, liability, penalty or tax)	Yes. (Service obligation Liability, penalty or tax)	No. May apply during service or up to 6 months after to court.

\*Section Numbers keyed to SSCRA as codified at 50 App. U.S. Code.



## **APPENDIX A**

# **SAMPLE SSCRA LETTERS**





Sample Letter to Creditor  
Reduction of Interest Rate

**[LETTERHEAD]**

**[Date]**

Legal Assistance Office

**[CREDITOR ADDRESS]**

Dear **[Sir or Madam]**:

I am a legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** informs me that **[he/she]** is currently obligated to your company for a loan bearing an interest rate of **[%]**. I further understand that this obligation was entered into on **[DATE]**.

Since incurring this obligation, **[CLIENT]** has entered the active military service of the nation in the U.S. **[SERVICE]** on **[DATE]**. This entry into active military service has materially affected **[CLIENT's]** ability to meet this obligation. Under these circumstances, federal law prescribes the maximum interest rate which **[CLIENT]** may be charged.

The Soldiers and Sailors Civil Relief Act (50 U.S.C. App. § 526) prescribes a ceiling of 6% annual interest on any obligation under the circumstances described above. This interest rate must be maintained for the entire period that **[CLIENT]** is on active duty. The percentage cap includes all service charges, renewal charges, and fees. The rate is applied to the outstanding balance of the obligation as of the date of entry onto active duty mentioned above. Any interest charge above this statutory ceiling must be forgiven, not accrued.

Please ensure that your records reflect this statutory ceiling and that any charges in excess of a 6% annual rate are withdrawn. You should also be aware that federal law (50 U.S.C. App. §531) circumscribes the manner in which you may enforce certain rights under the contract, including any right to repossession of property.

I thank you in advance for your attention to this matter. Should there be any questions, please feel free to contact me at the address above.

Sincerely,

**[ATTORNEY NAME]**

**[RANK]**, U.S. Army

Sample Letter to Opposing Counsel

Requesting a Stay of Proceedings

**[LETTERHEAD]**

**[Date]**

Legal Assistance Office

**[COUNSEL'S ADDRESS]**

Dear **[Sir or Madam]**:

I am a military legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** is the defendant in an action you filed on behalf of **[OPPOSING PARTY]** in **[COURT]**. The mission of our office is to provide initial counseling to soldiers to help them make more informed decisions about their legal obligations. We are not allowed to represent soldiers in any fashion in these types of civil actions. [ELAP jurisdictions delete the prior sentence.] I am not **[CLIENT's]** attorney for the underlying matter and this letter should not be construed as an appearance or submission to jurisdiction. Rather, I am simply assisting **[CLIENT]** in protecting his interests until such time as he can obtain proper legal counsel.

**[CLIENT]** is currently in the active military service of the nation in the U.S. **[SERVICE]**. Federal law affords such service people certain rights prescribed by the Soldiers and Sailors Civil Relief Act. Among these rights is the stay of all legal proceedings during the period of active service when the service members ability to conduct a defense is materially affected. 50 U.S.C. App. §521. In this case, **[CLIENT]** informs me that he will not be able to attend any proceedings and protect his interests until **[DATE]**. This inability to appear is caused by **[REASONS]**, direct results of his military service. **[CLIENT's]** inability to attend is supported by the attached memorandum from his commanding officer.

Because **[CLIENT's]** military service prevents his appearance, I request that you advise the court of **[CLIENT's]** status and request a stay until **[DATE]**. I further request that you advise **[CLIENT]** of any action you take at **[ADDRESS]**.

Thank you in advance for your help in affording **[CLIENT]** an opportunity to participate in the legal process while meeting his obligations to the defense of our nation.

Sincerely,

**[ATTORNEY NAME]**

**[RANK]**, U.S. Army

Sample Letter to the Clerk of Court

Requesting a Stay of Proceedings

**(NOTE: This letter should be prepared for the signature of the client's commanding officer. At least one court has construed a letter directly from a legal assistance attorney to be an appearance causing the client to lose valuable rights!)**

**[LETTERHEAD]**

**[Date]**

Commander

**[CLERK OF COURT ADDRESS]**

Dear **[Sir or Madam]**:

I am an officer in the U.S. **[SERVICE]** writing on behalf of **[CLIENT]**, who is the defendant in an action now pending before your court, **[CASE ID NUMBER]**. **[CLIENT]** is currently serving in the active military service of the nation at **[INSTALLATION]**. He is assigned to my command.

**[CLIENT]** will be unable to attend any hearings, present any type of defense, or effectively protect his interests in the matter in question until **[DATE]** because of his military duties. Until this date, **[CLIENT]** is needed by this unit to/because **[REASONS]**<sup>1</sup>. **I am advised by legal counsel that federal law allows a stay of proceedings for service members on active duty when their ability to defend themselves is materially affected by their military service (50 U.S.C. App. § 521). In this instance, [CLIENT's] critical role in the national security mission of this command precludes his participation in court proceedings until [DATE]. He will be unable to present any defense at all due to his duties.**

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<sup>1</sup> Reasons should clearly outline the duties to which the soldier must attend and why he cannot take leave. Examples would be to participate in a unit deployment to the National Training Center to deploy to Bosnia as part of the UN Implementation Force, or to prepare forces for deployment to Haiti. Whatever reason is given, the reasons why the soldier is critical to this mission must be explained.

Request that you grant a stay in the proceedings until **[DATE]** to allow **[CLIENT]** to properly attend to both of his obligations. I will personally ensure that he is placed on leave immediately following the completion of the duties described above, so that he may appear at the next scheduled court date after **[DATE]**. I should note that I am not an attorney and am not making this request based on any attorney-client relationship between myself and **[CLIENT]**. I am not representing **[CLIENT]** with regard to the proceedings pending in your court. This letter should not be considered an appearance by **[CLIENT]**. Rather, it is a request in my capacity as a commander, charged with a mission supporting the national security of this nation, that you delay the proceedings to allow this soldier to perform his critical part in that mission.

Thank you in advance for your assistance in this matter. I request that you inform myself or **[CLIENT]**, at the above address, of any action taken regarding this request.

Sincerely,

**[COMMANDER NAME]**  
**[RANK]**, U. S. Army  
Commanding Officer

# APPENDIX B

## INVOLUNTARY ALLOTMENT INFORMATION

### FROM DFAS

#### **Military Commercial Debt Allotments**

##### **Commonly Asked Questions**

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##### **1. How do I apply for an involuntary allotment?**

A creditor may initiate this process against a military member by submitting an Involuntary Allotment Application (DD Form 2653) along with a certified copy of a final judgment issued by a civil court. An original and three copies of both the form and the judgment are required. Also, the application must contain the member's full name and social security number for positive identification. The completed package should be sent to the following address:

Defense Finance and Accounting Service-Cleveland Center  
Attention: Code L  
P.O. Box 998002  
Cleveland, OH 44199-8002

A blank DD Form 2653 may be obtained by writing the address above or by calling (216) 522-5301. Please be sure to include your return address on any correspondence, not just on the mailing envelope.

##### **2. How much time does it take after I send in the application to DFAS before payments begin?**

The regulation which establishes the procedures DFAS must follow when processing these applications contains mandatory time allowances that the military member must be given to respond prior to an involuntary allotment being started. This will normally prevent DFAS from establishing an involuntary allotment until 90 to 120 days after the application is received. However, if the member responds quickly and does not contest the allotment, this time could be shorter.

### **3. How much of the member's pay can I get each month? What if there are other allotments in place?**

The Consumer Credit Protection Act, 15 U.S.C. 1673, establishes the maximum amounts that may be withheld from individual's pay for garnishments or other legal process to satisfy commercial debts. This amount is 25 percent of the individual's disposable pay. Disposable pay is the gross pay minus certain authorized deductions such as income tax withholding or debts owed to the government. If the member already has other involuntary allotments in place, it is possible that you will have to wait until that debt is paid prior to receiving any money for your application. Also, if deductions are being made to satisfy child support obligations, it is possible there will be no funds available to satisfy commercial debts for many years to come. In this case, you will be notified by DFAS of the status of your application.

### **4. What is the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA)? How does it affect my application for involuntary allotment?**

The SSCRA is a federal law which applies at all times, not just when we are at war. It was designed to protect the legal rights of those who have been called upon to serve their country in the military. There are many provisions in the SSCRA. Most of them allow a service member to delay certain legal actions if his military service affects his ability to participate in the proceeding. There are also provisions which affect a member's financial transaction, such as allowing for lowered interest rates on loans while a member is serving on active duty.

However, the portion that is relevant to military commercial debt allotments is 50 U.S.C. App. Sec 520. This section basically says that in any proceeding where the defendant has failed to make any appearance, prior to any default judgment being issued, the plaintiff must file an affidavit with the court stating whether or not the defendant is in the military service, or that the plaintiff is unable to determine that fact after a reasonable effort. If the plaintiff states either that the defendant is in the military service, or that they are unable to determine whether or not the defendant is in the military service, prior to any default judgment, the court shall appoint an attorney to represent the defendant and protect his interest.

The fact that a plaintiff or court do not follow this mandatory procedure does not make the judgment void. It does make the judgment voidable at the court's option upon a proper showing of certain proof by the defendant. However, in order to use the military involuntary allotment process, an applicant must comply with the statute. Pursuant to the implementing regulation, DFAS has been given the responsibility to ensure that the procedural provisions of the SSCRA have been complied with prior to starting an involuntary allotment for commercial debt against a military member.

Therefore, a judgment issued by a court against a military member, where SSCRA was not complied with, is unenforceable against the military pay of that member. Also, because the SSCRA says these procedures must be followed prior to a default judgment being issued, there is no way to go back, aside from vacating the judgment and starting the process again, to comply with the SSCRA after the fact.

## **5. Is there any fee for establishing the involuntary allotment?**

Yes. Recent legislation has given DFAS the authority to collect an administrative fee for processing military commercial debt allotments. The fee is currently \$75.00. This fee will be deducted from the amount that is paid to the creditor. So, if you send in an application for an involuntary allotment to collect a judgment for \$500.00, and an involuntary allotment is established, you will receive \$425.00.

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DFAS Home | Garnishment

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Send E-mail comments to [dfaslane@cleveland.dfas.mil](mailto:dfaslane@cleveland.dfas.mil)

June 5, 1997

URL - <http://www.dfas.mil/money/garnish/mcda-qa.htm>





## APPENDIX C

### SSCRA Note

#### *Child Support and Paternity Case Stay Actions Impacted by the Welfare Reform Act of 1996*

One of the most commonly used sections of the Soldiers' and Sailors' Civil Relief Act<sup>2</sup>, is the "military stay" provision for civil court actions at Section 201 [50 U.S.C. App. ?§ 521]<sup>3</sup>. Section 201 states:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as a plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the the discretion of the court in which it is pending, on its own motion, and shall on application to it by such person or some person on his behalf, be stayed as provided in this Act unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

This stay provision applies to both pre-service and in-service court actions and proceedings. A civilian court, upon request of a soldier's representative<sup>4</sup>, may stay any hearing or ruling on such action upon a showing that the service member plaintiff or defendant is unavailable (unable to take leave)<sup>5</sup>, and that the service member would be prejudiced or "materially affected" by their inability to personally attend the court proceedings<sup>6</sup>. The first

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<sup>2</sup> Act of Oct 17, 1940, ch. 888, 54 Stat. 1178 (as amended)(currently codified at 50 U.S.C. App. §§ 501-593(1994)).

<sup>3</sup> *Id.*, at ? 201 (current version at 50 U.S.C. App. § 521 (1994)).

<sup>4</sup> Legal assistance attorneys are strongly discouraged from directly contacting a court to assert a stay. Several states consider such stay requests by attorneys to be an appearance, which precludes the client from being able to reopen a default judgment under Section 520 [50 U.S.C. App.], if the stay request is denied. *See* Skates v. Stockton, 683 P.2d 304, 306 (Ariz. Ct. App. 1984); Artis -Wergin v. Artis -Wergin, 444 N.W.2d 750, 753-754 (Wis. Ct. App. 1989); Mary Kathleen Day, Comment, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act*, 27 Tulsa L.J. 45, 55 (Fall 1991); Major Howard McGillin, *Stays of Judicial Proceedings*, The Army Lawyer, July 1995, at 68; and Michael A. Kirtland, *Civilian Representation of the Military C\*L\*I\*E\*N\*T*, 58 Ala. Law. 288, 289 (Sep. 1997). The better courses of action are to have the service member's commander request the stay or request opposing counsel to raise the issue before the court. *See* Cromer v Cromer, 278 S.E.2d 518 (N.C. 1981), and Sacotte v. Ideal-Werk Krug, 359 N.W.2d 393 (Wis. 1984).

<sup>5</sup> 50 U.S.C. § 521 (1994).

<sup>6</sup> *Id.*

prong of the stay requirement may be harder to meet as the result of the Welfare Reform Act of 1996 ("Welfare Reform Act").<sup>7</sup>

The Welfare Reform Act directed the Department of Defense to promulgate regulations to facilitate service members obtaining leave for appearances in paternity and child support cases. The Act states, in part:

- (1) Regulations. The Secretary of each military department...shall prescribe regulations to facilitate the granting of leave to a member of the Armed Forces under the jurisdiction of the Secretary in a case in which--
  - (A) the leave is needed for the member to attend a hearing described in paragraph (2);
  - (B) the member is not serving in or with a unit deployed in a contingency operation (as defined in section 101 of title 10, United States Code); and
  - (C) the exigencies of military service (as determined by the Secretary concerned) do not otherwise require that such leave not be granted.
- (2) Covered Hearings. Paragraph (1) applies to a hearing that is conducted by a court or pursuant to an administrative process established under State law, in connection with a civil action--
  - (A) to determine whether a member of the Armed Forces is a natural parent of a child; or
  - (B) to determine an obligation of a member of the Armed Forces to provide child support.
- (3) Definition.--For purposes of this subsection--
  - (A) The term "court" has the meaning given in that term in section 1408(a) of title 10, United States Code.
  - (B) The term "child support" has the meaning given such term in section 459(i) of the Social Security Act (42 U.S.C 659(i)).<sup>8</sup>

On September 10, 1997, the Department of Defense, in compliance with the Welfare Reform Act, promulgated the following change to Department of Defense Directive 1327.5, "Leave and Liberty"<sup>9</sup>:

F.25. When a Service member requests leave on the basis of need to attend hearings to determine paternity or to determine an obligation to provide child support, leave shall be granted, unless a. the member is serving in or with a unit

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<sup>7</sup> Welfare Reform Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>8</sup> *Id.*, at § 363(b), 110 Stat. 2248.

<sup>9</sup> U.S. DEPT OF DEFENSE, DIR. 1327.5, LEAVE AND LIBERTY (24 Sep. 1985)[hereinafter DOD DIR. 1327.5].

deployed in a contingency operation or b. exigencies of military service require a denial of such request. The leave shall be charged as ordinary leave.<sup>10</sup>

The Department of the Army is in the process of revising Army Regulation 608-99, Family Support, Child Custody, and Paternity,<sup>11</sup> and Army Regulation 600-8-10, Leaves and Passes,<sup>12</sup> to reflect the Welfare Reform Act and DOD directives granting liberal leave in paternity and child support cases.<sup>13</sup> The "exigencies of military service" provision will probably be quite narrowly construed, to avoid shielding service members from meeting their legitimate child support obligations.<sup>14</sup>

What does this change mean for legal assistance attorneys attempting to obtain a stay for their clients in paternity and child support cases? Civil courts will start to take notice of this new leave provision, which should limit successful stay attempts in child support and paternity support cases where the service member is not truly unavailable to attend court proceedings<sup>15</sup>. However, those service members most deserving of a stay should be able to point to their contingency operation deployment or military exigency situation to bolster their request for a stay.

Those child support claims rising out of either divorce or paternity proceedings may now be resolved by administrative hearing.<sup>16</sup> These administrative proceedings are not subject to the Soldiers' and Sailors' Civil Relief Act. There are no stays for such administrative proceedings. Such proceedings are subject to the new "liberal leave" provision of the Welfare Reform Act, requiring service members to attend, except where they are involved with contingency operations or "military exigencies" which prevent their attendance.<sup>17</sup>

Civilian courts already are very reluctant to hold up child support or paternity support determinations where all the facts are available to make the necessary child support calculations based upon current child support formulas adopted by most states.<sup>18</sup> Unless the service member falls outside the formula guidelines, there is no factual dispute as to how much the service member owes for support. Civil courts in

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<sup>10</sup> Change 4, U.S. DEPT OF DEFENSE, DIR. 1327.5, LEAVE AND LIBERTY (10 Sep. 1997), to DOD DIR. 1327.5]. The change became effective immediately. (10 September 1997).

<sup>11</sup> U.S. DEPT of ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (1 Nov. 1994).

<sup>12</sup> U.S. DEPT of ARMY, REG. 600-8-10, LEAVES AND PASSES (1 July 1994).

<sup>13</sup> Telephone interview with John T. Meixell, Staff Counsel, Legal Assistance Policy Division, Office of the Judge Advocate General, U.S. Army (9 March, 1998).

<sup>14</sup> *Id.*

<sup>15</sup> See *Underhill v. Barnes*, 288 S.E.2d 905 (Ga. 1982) (Court denies stay request upon taking judicial notice of service leave regulations, where soldier made no effort to request leave, and the court calculated the service member had leave available); *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980); *Bowman v. May*, 678 So.2d 1135 (Ala. Civ. App. 1996); *Judkins v. Judkins*, 441 S.E.2d 139 (N.C. 1994):

<sup>16</sup> Welfare Reform Act of 1996, Pub. L. No. 104-193, ? 363, 110 Stat. 2248 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> 42 U.S.C. §§ 651-667 (1994).

such cases, concerned for the welfare of children, are unlikely to find that military service materially affects a service member's case, when the service member has no good faith defense.<sup>19</sup> Similarly, the absence of the service member from a temporary child support hearing has been held to be non-prejudicial, since the decision is not final, and is subject to further modification.<sup>20</sup> However, a stay should be expected in contested paternity<sup>21</sup> and divorce cases<sup>22</sup> where child support is not the only issue.

LTC Conrad

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<sup>19</sup> Ford v. Ford, 1996 WL 685787 (Ohio App. 2 Dist.) (unpub.) (where the court has all the facts to determine child support, presence of the military member is not necessary at a child support modification hearing); Jaramillo v. Sandoval, 431 P.2d 65 (N.M. 1967) (service member's obligation as to future support resolved in his absence is non-prejudicial, since paternity was adjudicated with service member present); Power v. Power, 720 S.W.2d 683 (Tex. Ct. App. 1986); and Roger M. Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act*, 32 Santa Clara L. Rev. 137, 154-157 (1992).

<sup>20</sup> Shelor v. Shelor, 383 S.E.2d (Ga. 1989). Most state temporary child support statutes do not require the appearance of both parties at a hearing. See e.g., WIS. STAT. ANN. § 767.23 (1)(a) (West 1997) (only one party required for temporary support order).

<sup>21</sup> Baron, *supra*, at 156-157; Mathis v. Mathis, 236 So.2d 755 (Miss. 1970) (contested paternity must be resolved with the service member present, as absence materially affects his defense); Stringfellow v. Whichelo, 230 A.2d 858 (R.I. 1967).

<sup>22</sup> Baron, *supra*, at 154-156; Kramer v. Kramer, 668 S.W.2d 457, 458-59 (Tex. Ct. App. 1984) (child custody in dispute); Smith v. Smith, 149 S.E.2d 468, 471 (Ga. 1966) (alimony entitlement issue); and Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (child custody in dispute).

## APPENDIX D

1998-JUL ARMLAW 63

(Cite as: 1998-JUL Army Law. 63)

Army Lawyer

July, 1998

**Department of the Army Pamphlet 27-50-308**

**TJAGSA Practice Note**

**Faculty, The Judge Advocate General's School, U.S. Army**

**SSCRA Note**

**\*63 FEDERAL COURT RULES THAT MILITARY MEMBERS HAVE A PRIVATE  
CAUSE OF ACTION  
UNDER THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**

Lieutenant Colonel Conrad

*Opinions and conclusions in articles published in the Army Lawyer are solely those of the authors. They do not necessarily reflect the views of the Judge Advocate General, the Department of the Army, or any other government agency.*

In the recent case of *Moll v. Ford Consumer Finance Co., Inc.*, [FN56] the U.S. District Court for the Northern District of Illinois ruled that service members may sue creditors who violate § 526 of the Soldiers' and Sailors' Civil Relief Act [FN57] (SSCRA). Section 526 of the SSCRA states:

No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a person in military service before that person's entry into military service shall, during any part of the period of military service, bear interest at a rate in excess of 6 percent per year unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section, the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability. [FN58]

This provision of the SSCRA is commonly known as the "six percent interest cap" provision. [FN59]

In July 1986, Gary Moll, an Air Force Reserve member, obtained a fifteen-year loan secured by a second mortgage on his home, with a variable annual interest rate of 10.25 percent. On 25 February 1991, Moll was ordered to active duty to serve in support of Operation Desert

Storm. Once activated, Moll notified Ford, his lender, of his military status and requested reduction of his loan interest to six percent, pursuant to 50 U.S.C. App. § 526. He provided all of the documentation that the lender requested, which showed that his military service materially affected his ability to pay his loan. Despite the fact that Moll followed the SSCRA procedure for interest rate relief, Ford never adjusted his interest rate to six percent while he was on active duty.

On 16 July 1997, Moll filed a class action suit, in which he alleged that the lender failed to comply with § 526 of the SSCRA. [FN60] The lender moved to dismiss the action for failure to state a claim. The court denied the lender's motion as to the issue of whether a private cause of action exists under the SSCRA. [FN61]

The court recognized that § 526 provides a six percent loan interest rate cap for activated military members on preservice loans. The court further recognized a lender's right to petition the court for a determination that the military member's active duty did not materially affect his ability to pay the loan. [FN62] Moll claimed that, since he properly asserted his rights under the SSCRA, the lender should have reduced his loan interest to six percent and that Ford's failure to do so violated the SSCRA. [FN63]

Ford, for purposes of the motion to dismiss, did not dispute Moll's interpretation of the meaning of § 526, the protections it provides for activated reservists, or that Moll's military service materially affected his ability to pay the loan. [FN64] Instead, Ford claimed that the SSCRA does not provide service members with a private right to sue to enforce the SSCRA. Ford claimed that the SSCRA provides only "defensive relief," that is, that § 526 would only protect the service member if Ford attempted to enforce the loan upon default.

**\*64** The court dismissed Ford's argument, observing:

Such an interpretation of [the] SSCRA is not only illogical, but would severely limit the relief available under § 526, since it is quite unlikely that any mortgagor will default on his obligation for the sole purpose of taking advantage of a moderate interest rate reduction during his period of military service. [FN65]

If the service member made timely payment on his mortgage loan, he would have no recourse under Ford's "defensive relief" theory. The court pointed out that mortgage holders generally foreclose only when a borrower fails to pay his loan in a timely manner. [FN66] In most cases, unless the service member was in serious monetary default, the lender would not want to raise the six percent interest cap issue by initiating foreclosure proceedings.

The court reviewed the case law that interprets the SSCRA [FN67] and emphasized that "Congress intended the SSCRA to be liberally construed in favor of the military person and administered to accomplish substantial justice." [FN68] Looking at the equities in six percent interest cap cases, the court dismissed Ford's "defensive relief" argument. The court reasoned that Congress could not have intended to encourage lenders to ignore six percent interest

requests by providing no way for borrowers to enforce the six percent interest cap provision. [FN69]

The court then addressed Ford's argument that the SSCRA does not expressly provide for a private cause of action to enforce § 526 or any other section of the Act. Noting that no court has previously considered whether a military member may assert a claim against a lender who fails to comply with § 526, [FN70] the court applied the four-part test established by the United States Supreme Court in *Cort v. Ash* [FN71] to determine whether there is an implied right to sue under a federal statute. [FN72] Under *Cort*, the court must determine:

- (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted;
- (2) whether there is any implication that Congress intended to create or [to] deny such a remedy;
- (3) whether an implied remedy is consistent with the underlying purpose(s) of the statute; and
- (4) whether the cause of action is one traditionally relegated to state law. [FN73]

The court noted that the Supreme Court has chiefly concentrated on the second factor, Congress' intent to create a private right to sue. [FN74] The court then examined Congress' intent to allow military members to sue to enforce § 526.

The court examined the legislative history of § 526 and determined that Congress intended to give special relief to activated military members. [FN75] Relying on *McMurtry v. City of Largo*, [FN76] Ford argued that § 526 does not confer any special benefit to military members that is not available to civilians. [FN77]

In *McMurtry*, the City of Largo declared a building a public nuisance, condemned it, and destroyed it. The building was owned by a service member who was overseas on active duty. Upon his return from active duty, the service member sued the \*65 city to recover the costs of the building and condemnation. [FN78] Although the statute of limitations on appealing the condemnation decision was tolled by § 525 of the SSCRA [FN79] while Mr. *McMurtry* was overseas, he failed to appeal the decision in a timely manner upon his return. The court found that Mr. *McMurtry* had no federal cause of action under the SSCRA, since civilians in Mr. *McMurtry*'s situation must exhaust state statutory remedies before seeking federal relief. [FN80] The court held that the SSCRA did not provide service members with a specific federal court remedy when they failed to file a lawsuit properly under state law. [FN81]

The court in *Moll* distinguished *McMurtry* on the grounds that *Moll* was seeking to enforce a specific right provided by § 526 of the SSCRA. [FN82] Unlike Mr. *McMurtry*, Gary *Moll* had no state remedy. *Moll* was relying solely on a federal statute to cap loan interest at six percent while on active military duty. The court further observed that § 526 provides military members "an undeniable benefit not enjoyed by other citizens." [FN83] The court pointed to the enactment of § 518(2)(B) of the SSCRA in 1991. Congress passed this section to amplify that "[r]eceipt by a person in military service of ... [a] suspension pursuant to the provisions of this Act in the payment of any ... civil obligation or liability of that person shall not itself ... provide



the basis for ... a change by the creditor in the terms of an existing credit arrangement." [FN84]

The court recognized that § 518 specifically prohibits creditors from altering the terms of an obligation strictly because of the six percent interest cap. [FN85] Since the creditor cannot defer any interest above six percent without changing the terms of the obligation, the court reasoned that § 526 bestows a benefit on military members not available to civilians. [FN86] The court further reasoned that Congress must have intended a private cause of action to enforce the provisions of § 526, "because otherwise the relief would [be] of no value at all." [FN87]

Finally, the court looked at the three other factors in Cort [FN88] that, if satisfied, would allow an implied federal cause of action. First, the plaintiff, as an Air Force reservist, was a member of the class for whose benefit the SSCRA was enacted. [FN89] Second, the implied remedy of a federal lawsuit is consistent with the underlying purposes of the SSCRA--to provide military personnel with relief in meeting their preservice financial obligations. [FN90] Third, § 526 provides service members with relief that is not typically found in state law, and it is based on Congress' constitutional war powers. [FN91]

Moll opens up a new avenue for military legal counsel to assert the six percent interest cap with lenders who refuse to voluntarily comply with § 526. The potential threat of possible legal action short of foreclosure should increase creditor compliance with § 526. The court also warns creditors that they may not avoid the six percent interest cap by adding extra principal \*66 payments or balloon interest rates. [FN92] This case further allows Reserve Component service members, upon return from active duty, to go back to noncooperative lenders who failed to honor the six percent interest cap to seek reimbursement for interest wrongly paid.

FN56. No. 97 C 5044, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. Mar. 23, 1998).

FN57. 50 U.S.C. App. §§ 501-593 (1994).

FN58. Id. § 526.

FN59. See Major James Pottorff, Protection for Active and Reserve Component Soldiers, ARMY LAW., Oct. 1990, at 48; Major James Pottorff, A Look at the Credit Industry's Approach to the Six Percent Limitation on Interest Rates, ARMY LAW., Nov. 1990, at 49; James Pottorff, Soldiers' and Sailors' Civil Relief Act Protection for Reserve Component Servicemembers Called to Active Duty, VA. L. REG., Dec. 1990, at 7; Larry Carpenter, The Soldiers' and Sailors' Civil Relief Act: Legal Help for the Sudden Soldier, 25 ARK. LAW. 42 (1991); Joseph Chappelle, Legal Primer for Advising the Deployed Servicemember, 34 RES GESTAE 494 (1994); Kathleen H. Switzer, Benefits for Reserve and National Guard Members Under the Soldiers' and Sailors' Civil Relief Act of 1940, 110 BANKING L.J. 517 (1993); Major Mary Hostetter, Using the Soldiers' and Sailors' Civil Relief Act to Your Client's Advantage, ARMY LAW., Dec. 1993, at 34, 36-37.

FN60. Moll, 1998 U.S. Dist. LEXIS 3638, at \*2-3. Moll also alleged a violation of the Illinois Interest Act, but that allegation will not be discussed in this article. See 815 ILL. COMP. STAT. 205/0.01 (West 1997).

FN61. Moll, 1998 U.S. Dist. LEXIS 3638, at \*1, \*3.

FN62. Id. at \*4.

FN63. Id.

FN64. Id. at \*5-6. Ford stated that it did reduce Moll's interest rate, but Moll denied this. Id. at \*7 n.2.

FN65. Id. at \*7.

FN66. Id. at \*8 n.3.

FN67. See *LeMaistre v. Leffers*, 333 U.S. 1, 6 (1948); *Hellberg v. Warner*, 48 N.E.2d 972, 975 (Ill. App. 1943).

FN68. Moll, 1998 U.S. Dist. LEXIS 3638, at \*7.

FN69. Id.

FN70. Id. at \*8.

FN71. 422 U.S. 66 (1975).

FN72. Moll, 1998 U.S. Dist. LEXIS 3638, at \*8.

FN73. Id. at \*8-9. See *Cort*, 422 U.S. at 78, as cited in *Long v. Trans World Airlines, Inc.*, 704 F. Supp. 847, 853 (N.D. Ill. 1989).

FN74. Moll, 1998 U.S. Dist. LEXIS 3638, at \*8 (citing *Suter v. Artist M.*, 503 U.S. 347, 364 (1992); *Thompson v. Thompson*, 484 U.S. 174, 178, (1988)).

FN75. Id. at \*10 n.4 (citing 88 CONG. REC. 5364 (1942) (comments of Representative Sparkman) ("[T]he primary purpose of this legislation is to give relief to the boy that is called into service."); *Patrikes v. J.C.H. Serv. Stations*, 41 N.Y.S.2d 158, 165 (N.Y. City Ct. 1943) ("The underlying purpose of the SSCRA is to provide the soldier with relief in meeting his financial obligations that he incurred prior to his military service.")).

FN76. 837 F. Supp. 1155 (M.D. Fla. 1993) (holding that the SSCRA does not provide for a private cause of action in federal court). See *Tolmas v. Streiffer*, 21 So. 2d 387 (La. Ct. App. 1945).

FN77. Moll, 1998 U.S. Dist. LEXIS 3638, at \*10.

FN78. *McMurtry*, 837 F. Supp. at 1156-57.

FN79. 50 U.S.C. App. § 525 (1994) (tolling the statute of limitations on actions or proceedings by courts, boards, and government agencies while a service member is on active duty status, if the action accrued prior to or during active military service).

FN80. *McMurtry*, 837 F. Supp. at 1157-58.

FN81. Moll, 1998 U.S. Dist. LEXIS 3638, at \*11.

FN82. Id. at \*12.

FN83. Id.

FN84. SSCRA Amendments of 1991, Pub. L. No. 102-12, § 7, 105 Stat. 38 (1991) (codified as amended at 50 U.S.C. App. § 518).

FN85. Moll, 1998 U.S. Dist. LEXIS 3638, at \*13-14.

FN86. Id. at \*14 n.5. The court cited Senator Biden's comments regarding the passage of § 518, which indicated that it was a reaction to creditors who failed to grant the relief provided by § 526. Creditors [are] not granting the relief promised by the Act, especially with regard to interest rates. Section 526 of the Act clearly limits interest on debts incurred prior to being activated to 6 percent for the full period of active duty. Yet, qualifying applicants have been asked by creditors to make up payments or higher interest charges in the future. In my view, those practices are contrary to both the spirit and the letter of the law.  
101 CONG. REC. S 2142 (1991) (comments of Senator Biden).

FN87. Moll, 1998 U.S. Dist. LEXIS 3638, at \*14.

FN88. Cort v. Ash, 422 U.S. 66 (1975).

FN89. Moll, 1998 U.S. Dist. LEXIS 3638, at \*14. Air Force Reservists are covered by the SSCRA. See 50 U.S.C. App. § 511(1) (1994).

FN90. Moll, 1998 U.S. Dist. LEXIS 3638, at \*14.

FN91. Id. at \*15.

FN92. While not addressed by the court, creditor violations of § 526 may also subject them to violations of the Truth in Lending Act (TILA) disclosure provisions. See 15 U.S.C. §§ 1601-1667 (1994). Specific credit disclosure violations include: (1) failure to adjust the interest rate to six percent upon proper request by an activated Reservist, resulting in violation of the creditor's duty to disclose the proper interest rate [15 U.S.C. § 1637(b)(6)]; (2) failure to properly adjust any finance charge to reflect the six percent interest cap [15 U.S.C. § 1637(b)(4)]; and (3) failure to credit retroactively to the date of entry of active duty the reduced interest rate and resulting finance charges, resulting in erroneous disclosure of the balance due on the loan or credit transaction [15 U.S.C. § 1637(b)(2)].

## APPENDIX E

### The Soldiers' and Sailors' Civil Relief Act

1. The Soldiers' and Sailors' Civil Relief Act (SSCRA) is a federal law that gives all service persons some important rights as they enter active duty. This information paper outlines some of those rights and benefits. The information in this paper is for personnel in the Reserve Components who are activated to serve on active duty. Other rights and benefits are included in the Act for full-time personnel. This paper will not discuss those rights or benefits.
2. When does the SSCRA protect me?  
  
?? Most SSCRA protection commences on the day you receive your orders to active duty. As a practical matter, you should be ready, and expect to present a copy of those orders to whomever you ask for some right or benefit under the Act.
3. I have heard about 6% loans. How do I get them?  
  
?? You may be entitled to have the interest rate on some of your loans reduced to 6% for the time you are on active duty. There are a number of special requirements. You need to talk to a Legal Assistance Attorney to ensure you are eligible. You may be eligible if you and your loan meet the following conditions:
  - a) You took out the loan during a time when you were not on any form of **active duty** in any branch of the military.
  - b) The interest rate is currently above 6% per year.
  - c) Your military service affects your ability to pay the loan at the regular (pre-service) interest rate. Generally this requirement means that you make less money in the military than you made as a civilian. There are some special legal issues here - you should be ready to talk to your Legal Assistance Attorney about your entire financial situation.
  - d) You notified the lender.
4. What about the lease on my apartment? I live alone and I will not be there. I want to let my apartment go and put my furniture in storage. Can I get out of my lease? Generally - **yes**. If you have a lease for a house, apartment, or even a business location, you may be able to get out of the lease when you come on active duty. Here are the requirements:

- a) You originally signed your lease when you were not on any form of active duty.
  - b) You have received your orders to active duty.
  - c) You gave written notice to your landlord that you want to terminate your lease. You will still have to pay rent for a short while. Your landlord can charge you rent for 30 days after the date your next rent is due, after the date you give your written notice. Example: You give notice on 15 December. Your next rent is normally due 1 January. The landlord can make you pay rent until 31 January. The key is to get the written notice in the landlord's hands just as soon as possible.
5. I have to go to court on a lawsuit that came up over an auto accident last year. How can I get the lawsuit delayed?
- ?? If you are a party (one of the people suing or being sued) in a civil case (not a criminal case), your commander can ask the judge to stay or temporarily delay the proceedings until you can appear. Generally, your commander will have to show that military duty is keeping you from going to court. This is a tricky legal area - I recommend you have your civilian lawyer contact a Military Legal Assistance Attorney to discuss the best way to proceed in your case.
6. I am self-employed and I have health coverage that is pretty expensive. Can I stop my health coverage? What will happen when I get off of active duty and I try to start it again - will I still be covered?
- ?? As long as you are on active duty, your health care needs are covered by the Military's medical facilities. In addition, your family members will become eligible for coverage. You may want to suspend your civilian coverage. If you do this, the SSCRA will require your civilian insurance company to reinstate your coverage when you get off of active duty. They have to write you a policy. They cannot refuse to cover most "pre-existing conditions."
7. Will I have to pay state income taxes on my pay while I am on active duty?
- ?? If your home state taxes military pay, you will have to pay those taxes. If you get assigned to another state, you will still legally be a "domiciliary" of your home state. The state to which the military assigns you cannot tax your military pay. If you moonlight, they can tax that pay - just your military pay is exempt.

# The Soldiers' and Sailors' Civil Relief Act

## Teaching Notes for Attorneys

### **[*NOT TO BE DISTRIBUTED TO NON-ATTORNEYS!!*]**

1. The Soldiers' and Sailors' Civil Relief Act (SSCRA) is a federal law that gives all service persons some important rights as they enter active duty. This information paper outlines some of those rights and benefits. The information in this paper is for personnel in the Reserve Components who are activated to serve on active duty. Other rights and benefits are included in the Act for full-time personnel. This paper will not discuss those rights or benefits.

The Soldiers' and Sailors' Civil Relief Act (SSCRA) is found at 50 U.S.C. app. §§ 500-592. It was first enacted in 1918 during WWI. It was re-enacted just before the start of WWII. It was revised substantially in 1942 and has been revised several times since then. Two recent changes are outlined in this paper. These include the coverage dates of the Act and the health care provisions of the Act. These changes were made in specific response to issues that arose during the Gulf War.

The Act is designed to be a shield and not a sword. It assists soldiers in devoting their full attention to military duties rather than concerning themselves with civil obligations. One of the keys to implementing the provisions of the Act is being reasonable with the opposing party or, more importantly, the court.

2. When does the SSCRA protect me?

?? Most SSCRA protection commences on the day you receive your orders to active duty. As a practical matter, you should be ready, and expect to present a copy of those orders to whomever you ask for some right or benefit under the Act.

The Act covers all personnel on active duty from the moment of entering active duty (50 U.S.C. app. § 511) One of the 1991 amendments to the Act extended coverage of Articles I-III of the Act to reservists who have received their orders to active duty.

Two practical matters arise from the construction of the Act. The first is that soldiers could be required to prove a date of receipt of the orders. Therefore, as a practical matter, I have told soldiers to be prepared to give a copy of the orders to the person needing such proof. Obviously, physical possession proves receipt. The problem will be when a soldier seeks protection retroactively. In such a case, the soldier may have a problem proving the date of receipt.

The second practical matter in many of the SSCRA protections is the concept of whether military service “materially affects” the service person’s legal rights or obligations. While the Act says soldiers are entitled to the protection upon receipt of orders, they may have problems proving that military service (or call to military service) has “materially affected” their ability to pay the obligation. If, for example, a person works for full salary up until the date of entering service, it will be difficult to prove “material affect” before actually entering military service. On the other hand, if the soldier is a professional or solely employed and has had to wind down a business because of the call to duty - they may be able to show that the call to military service “materially affected” him or her before the date of entering service.

3. I have heard about 6% loans. How do I get them?

?? You may be entitled to have the interest rate on some of your loans reduced to 6% for the time you are on active duty. There are a number of special requirements. You need to talk to a Legal Assistance Attorney to ensure you are eligible. You may be eligible if you and your loan meet the following conditions:

- a) You took out the loan during a time when you were not on any form of **active duty** in any branch of the military.
- b) The interest rate is currently above 6% per year.
- c) Your military service affects your ability to pay the loan at the regular (pre-service) interest rate. Generally this requirement means that you make less money in the military than you made as a civilian. There are some special legal issues here - you should be ready to talk to your Legal Assistance Attorney about your entire financial situation.
- d) You notified the lender.

The SSCRA states that “ No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a person in military service before that person’s entry into that service shall, during any part of the period of military service, bear interest at a rate in excess of 6 percent per year, unless in the opinion of the court, upon application thereto by the obligee, the ability of the person in military service to pay interest upon such obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of such service....” 50 U.S.C. app. § 526. Several consequences result from this carefully worded provision:

First: If a soldier claims the protection of the Act, the burden of proof on the issue of whether military service “materially affects” the ability to pay is on the lender (the obligee).

Second: The method for computing the reduction in interest rates is fairly straightforward. During Operation Desert Storm, the major lending organizations agreed that the proper method was to take the remaining balance of the loan and re-amortize it for the remaining term of the loan at 6%. This will reduce the payments. Other asserted methods that were NOT accepted included ballooning the interest over 6% at the end of the loan, and reducing the rate but not the monthly payment. In addition, the Army actively resisted attempts by lenders to issue a new charge card to soldiers. Some lenders wanted to issue a new charge card to keep accounting easy for them (old charges - the pre-service balance - was reduced to 6%; new charges were at the prevailing rate).

Finally: The toughest part is the issue of proving that military service has “materially affected” the ability to pay. The clearest example is when the service person’s net income drops as a result of entering military service. The Act does not specify how much it must drop to be “materially affected.” If the service person no longer makes enough to support the loan, it is probably “materially affected.” An unreported case during Desert Storm, however, showed that the court may view “materially affected” as a total income issue. In that case, a physician did not have a drop in employment income. Her income from rental property did not drop. Consequently, the court found that her military service did not materially affect her ability to pay. You should inquire into the client’s total financial picture and advise the client that the client may have to use some (or all) of existing savings and investments before becoming eligible for the loan reduction. As the result of *Moll v. Ford Consumer Fin. Co., Inc.*, 1998 U.S. Dist. LEXIS 3638, 1998 WL 142411 (N.D. Ill. 1998), it now appears that soldiers may sue creditors that wrongly refuse to honor a 6% interest cap request.

4. What about the lease on my apartment? I live alone and I will not be there. I want to let my apartment go and put my furniture in storage. Can I get out of my lease?

?? Generally - **yes**. If you have a lease for a house, apartment, or even a business location, you may be able to get out of the lease when you come on active duty. Here are the requirements:

- a) You originally signed your lease when you were not on any form of active duty.
- b) You have received your orders to active duty.



- c) You gave written notice to your landlord that you want to terminate your lease. You will still have to pay rent for a short while. Your landlord can charge you rent for 30 days after the date your next rent is due, after the date you give your written notice. Example: You give notice on 15 December. Your next rent is normally due 1 January. The landlord can make you pay rent until 31 January. The key is to get the written notice in the landlord's hands just as soon as possible.

The Act is pretty straightforward on this issue. The controlling code section is 50 U.S.C. app. § 534. The only issue is the proper **written** notification to the landlord. The example above shows how the rent will be calculated. Be aware that, although landlords cannot retain a security deposit for lease termination under this provision, they may try to do it under a damage clause. Be prepared to help service personnel under your state landlord-tenant law as well as the SSCRA.

5. I have to go to court on a lawsuit that came up over an auto accident last year. How can I get the lawsuit delayed?

?? If you are a party (one of the people suing or being sued) in a civil case (not a criminal case), your commander can ask the judge to stay or temporarily delay the proceedings until you can appear. Generally, your commander will have to show that military duty is keeping you from going to court. This is a tricky legal area - I recommend you have your civilian lawyer contact a Military Legal Assistance Attorney to discuss the best way to proceed in your case.

The SSCRA has two provisions that may help soldiers in ongoing litigation. 50 U.S.C. app § 521 allows a soldier who is either a defendant or a plaintiff to request a stay of judicial proceedings if military service materially affects the service person's ability to prosecute or defend that action. Generally, this requires a showing of two facts. First, the service person must show that a military duty is keeping him or her from attending court. Simply asserting inability to obtain leave or deployment overseas is NOT sufficient. *Compare Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980) (husband soldier asserts assignment to Germany and inability to take leave - wife [also a soldier] asks for excess leave from unit in Germany and gets Army relief loan to attend - stay for husband denied) *with Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981) (sailor deployed on cruise entitled to stay). The second factual prong is that there must be an actual harm to the service-member's case. Usually, this means that the service person's presence in court is absolutely necessary to preclude irreparable harm. Courts have interpreted this somewhat broadly, particularly in family support cases. Thus, in *Shelor v. Shelor*, the court found that the service person did not have

to be present in court at a temporary child support hearing because such hearings produced results that were inherently interlocutory and subject to modification by his petition at a later time. 383 S.E.2d 895 (Ga. 1989).

NOTE: This section is not available if the attorney is the one entering the service or if a witness is entering the service. It only pertains to the parties.

The second protection is against default judgments. 50 U.S.C. § 520 protects against default judgments and allows service personnel to reopen default judgments. This provision only applies to service person defendants. The single, largest requirement is that the service person must have made no appearance whatsoever in the case. If the service person makes an appearance (including, under some circumstances, to make an application for a stay under § 521), he or she may lose the ability to use § 520 to reopen the default judgment. Note also that the opposing party has an obligation under § 520 to inform the court of the defendant's military status. If the opposing party fails to do so, however, § 520 makes the subsequent judgment merely voidable. We suggest that the service member's commander make the request for stay to avoid the appearance issue.

6. I am self-employed and I have health coverage that is pretty expensive. Can I stop my health coverage? What will happen when I get off of active duty and I try to start it again - will I still be covered?

?? As long as you are on active duty, your health care needs are covered by the Military's medical facilities. In addition, your family members will become eligible for coverage. You may want to suspend your civilian coverage. If you do this, the SSCRA will require your civilian insurance company to reinstate your coverage when you get off of active duty. They have to write you a policy. They cannot refuse to cover most "pre-existing conditions."

This is a new provision of the SSCRA. 50 U.S.C § 593. It covers non-employer sponsored health care coverage. Employer sponsored health coverage is protected under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4317.

Under this provision, a service person may terminate his or her health coverage when he or she becomes eligible for military health care. The section allows the service person to pick the policy back up after his or her service without any waiting periods or exclusions for pre-existing conditions that arise during or before military service. The only exclusion is a disability (adjudicated by the Department of Veteran's Affairs). This is a new code section and there are no cases interpreting its provisions as of March 1998.

The statute does not explicitly address the issue of rates. One should argue that since this is policy “reinstatement” that the same rate should apply as before the military service. Naturally, across-the-board rate increases could be included in the new rate.

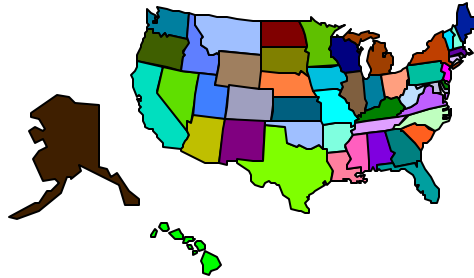
7. Will I have to pay state income taxes on my pay while I am on active duty?

?? If your home state taxes military pay, you will have to pay those taxes. If you get assigned to another state, you will still legally be a “domiciliary” of your home state. The state to which the military assigns you cannot tax your military pay. If you moonlight, they can tax that pay - just your military pay is exempt.

50 U.S.C. § 574 has several significant tax consequences. First, for the purpose of taxation, a service person neither gains nor loses domicile in any state, or political subdivision of a state, solely by moving to or from that area under military orders. Thus, a person who is domiciled in Philadelphia, Pennsylvania, before he or she comes into the military remains domiciled there for tax purposes despite assignment to another state (such as North Carolina). The second part of § 574 states that all military income is deemed received in the domicile of the service person. The combination of these two provisions prevents taxation of service member’s pay by two states. The military pay is deemed earned only in the domicile state, which does not change just because the soldier is assigned to a different state or political subdivision of the state. In addition, all personal non-business property of service personnel is deemed located in their domicile for purposes of personal property (*ad valorem*) taxation. Thus, a service person who is assigned to North Carolina (but remains domiciled in Pennsylvania) is exempt from North Carolina’s *ad valorem* tax on personal property such as cars. In addition, the service person may register the car in North Carolina and still avoid the *ad valorem* taxation.

?? For additional information in all of these areas, please refer to the Soldiers’ and Sailors’ Civil Relief Act Guide, JA 260, found on the JAGCNET. In addition, please feel free to call MAJ Daniel Culver, Administrative and Civil Law Department (Legal Assistance Branch), The Judge Advocate General’s School, (804) 972-6357, or (800) 552-3978 (extension 357) or e-mail him at [culverda@hqda.army.mil](mailto:culverda@hqda.army.mil) .

## CHAPTER 9



### STATE TAXATION

### SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

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**CHAPTER 9**  
**STATE TAXATION**  
**SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**  
**OUTLINE**

**I. REFERENCES**

- A. U.S.C.A. App. § 574 (2000).
- B. TJAGSA Publication JA 260, Soldiers' and Sailors' Civil Relief Act Guide, Ch. 6 (July 2000).
- C. Conrad, "*Nonmilitary Spouse's Joint Ownership of Personal Property Voids Soldiers' and Sailors' Civil Relief Act Personal Property Tax Protection*," The Army Lawyer, August 1997 at 24.
- D. Veldhuyzen and Wright, "*Domicile of Military Personnel for Voting and Taxation*," The Army Lawyer, September 1992 at 15.

**II. INTRODUCTION**

- A. THE AUTHORITY OF THE STATE TO TAX.
  - 1. General - A state can tax all income, from whatever source derived, of domiciliaries and statutory residents.
  - 2. With respect to nonresidents, states may tax all income earned within the state.

3. Definitions:

- a) Domiciliary - a person is a domiciliary of "[t]hat place where a man has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." Black's Law Dictionary 572 (5th ed. rev. 1979).
- b) BOTTOM LINE: Domicile or Legal Residence = Physical Presence and Intent to Permanently Reside in State. *See* Appendix A, *Fort Sheridan Tower* article, "Definition of 'Legal Residence'". 26 February 1988.

(1) Indicia of domicile:

- (a) Expressed intent, oral or written;
- (b) **Physical presence, past and present** (including duration)[**Prerequisite to establishing domicile**];
- (c) Residence of immediate family. *See* U.S. v. Minnesota, 97 F. Supp. 2d 973 (D. Minn. 2000) (residence of non-military spouse not controlling factor or presumptive of military member domicile).;
- (d) Location of schools attended by children;
- (e) Payment of nonresident tuition to institutions of higher education;
- (f) **Payment of taxes (income and personal property)**. [Important factor.] *But see* Wolff v. Baldwin, 9 NJ Tax 11 (N.J. Tax Court 1986) (one cannot establish domicile by paying taxes alone; physical presence is also necessary).;
- (g) **Ownership of real property**. [Important factor.];

- (h) Leasehold interests;
- (i) Situs of personal property.
- (j) **Voter registration.** [Important factor.] *See* Ca. Franchise Tax Board Legal Ruling No. 54, Residence: Effect of Military Personnel Registering to Vote, 1958 Cal. FTB LEXIS 54 (Cal. FTB 1958), and Veldhuyzen and Wright Army Lawyer article, "*Domicile of Military Personnel for Voting and Personnel*", Sep. 92 at 15. What about impact of "motor voter" laws?
- (k) **Vehicle registration.** [Important factor.] *See* Matter of Karsten, 924 P.2d 1272 (Ks. App. 1996) (Voluntary registration of motor vehicle doesn't equal automatic change of domicile);
- (l) **Motor vehicle operator's permit.** [Important factor, but not controlling by itself- Va. Dep't of Taxation P.D. 99-132, 1999 Va. Tax LEXIS 131 (Va. Dep't of Tax. 7 June 1999)];
- (m) Location of bank and investment accounts;
- (n) Explanations for temporary changes in residence;
- (o) Submission of DD Form 2058 (Change of domicile form-Appendix C);
- (p) Home of record at the time of entering service;
- (q) Place of marriage;
- (r) \*\*\*Spouse's domicile. (see discussion below). *See* U.S. v. State of Minnesota, 97 F.Supp. 2d 973 (D. Minn. 2000) (state cannot rely on non-military spouses domicile to determine domicile of military member).;



- (s) Place of birth;
  - (t) Business interests;
  - (u) Sources of income;
  - (v) Outside employment;
  - (w) **Declarations of residence on legal documents such as wills, deeds, mortgages, leases, contracts, insurance policies, and hospital records.**  
[Important factor.];
  - (x) **Declarations of domicile in affidavits or litigation.** [Important factor.];
  - (y) Address provided on federal income tax return;
  - (z) Membership in church, civil, professional, service or fraternal organizations;
  - (aa) Ownership of burial plots;
  - (bb) Place of burial of immediate family members; and
  - (cc) Location of donees of charitable contributions.
- (2) Spouse's Domicile.
- (a) Following arcane common law, some states mandate that a wife automatically assumes her husband's domicile, regardless of her intent.

- (b) *See* Ill. Ann. Stat. ch. 23, para. 2-10 (West 1992) (the residence of a married woman shall be that of her husband unless they are living separate and apart, in which case she may acquire a separate residence).
  - (c) *See also* Restatement (Second) of Conflicts § 21 (1988) ("...there were at least two reasons for the common law rule.... (first) the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband.... This view is no longer held. The second reason for the common law rule was the desirability of having the interests of each member of the family unit governed by the same law...").
  - (d) More states, however, are providing that a woman's domicile is established independently of her husband. These states include, among others, California, Colorado, Georgia, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, Virginia, and Washington.
  - (e) *See* Comment to Va. Code Ann. § 20-91 (1992); *Kerr v. Kerr*, 371 So. 2d 30 (Va. Ct. App. 1988) (the outmoded expectation that a wife is expected to follow her husband's change of abode is no longer applicable).
  - (f) *See* U.S. v. State of Minnesota, 97 F.Supp. 2d 973 (D. Minn. 2000) (state cannot rely on non-military spouses domicile to determine domicile of military member).
- c) Residence - implies something more than mere physical presence and something less than domicile; some states refer to "legal residence" as equivalent to "domicile".

- (1) "Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently.
    - (2) Residence means living in a certain locality, but domicile means living in that locality with intent to make it a fixed and permanent home." Black's Law Dictionary, 1176 (5th ed. rev. 1979).
  - d) Statutory resident - a person receives tax treatment as if he or she was a domiciliary provided he or she resides in the state the statutory number of days.
    - (1) Cal. Rev. & Tax. Code § 17014(a) (West) ("Resident' includes: (1) Every individual who is in this state for other than a temporary or transitory purpose...) and § 17016 ("Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose." (Emphasis added)).
    - (2) *See* 1991 proposed change in definition of California statutory resident to include military personnel and military response at Appendix B.
  - e) Nonresidents - are ordinarily defined in the negative: "One who does not reside within the jurisdiction in question; not an inhabitant of the state...." Black's Law Dictionary, 953 (5th ed. rev. 1979).
4. Special State Military Treatment: Some states treat certain domiciliary military members as nonresidents for tax purposes. The tests for such status vary.
- a) In some states, domiciliaries who are in the military service and are stationed outside the state are not required to pay state taxes while they are so stationed (Pennsylvania, Illinois).

- b) Other states (New York, Missouri) employ a three-part test which permits domiciliaries to avoid state taxes if the domiciliary:
  - (1) Maintains no permanent place of abode in state of domicile;
  - (2) Maintains a permanent place of abode outside state of domicile; and
  - (3) Spends a maximum of 30 days within state of domicile during the tax year in question.
  - (4) *See, e.g.,* N.Y. Tax Law § 605 (McKinney) ("A resident individual means an individual: (1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state."). [*See* Matter of Gatchell, 1984 N.Y. Tax Comm. 1984] (service member who lives in a military barracks does not have a "permanent place of abode" and does not get the income tax exemption).]

5. Change of Legal Residence/Domicile.

- a) Physical presence in the new state. *See* Juskowiak v. Commissioner of Revenue, 1996 Minn. Tax LEXIS 17 (Minn. 1996); Wolf v. Commissioner of Revenue, 1999 Minn. Tax LEXIS 41 (Minn. 1999), and Letter No. IT 96-0010, 1996 WL 305698 (Ill. Dept. Rev. 1996) (unpub.) (problems of JAG officer claiming change of legal residence from Wisconsin to Illinois)], AND
- b) Indications of simultaneous intent of making the new state the permanent domicile/legal residence. *See* Matter of Karsten, 924 P.2d 1272 (Ks. App. 1996) (purchasing a house or registering a motor vehicle in a host jurisdiction does not automatically change a service member's domicile, subjecting them to local taxation, unless the service member indicates intent to change domicile.)
- c) DD Form 2058 (Appendix C).

### **III. PRINCIPLES OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT - 50 U.S.C. APP. § 574.**

- A. U.S.C. app. § 574 provides that:
  - 1. The service member neither acquires nor loses residence or domicile solely by residing in a given state pursuant to military orders;
  - 2. Military income is deemed to be earned in the state of domicile; and
  - 3. A service member's personal property is deemed to be located in state of domicile.
- B. U.S.C. App. § 574 protects military income from double taxation because:
  - 1. Military income is taxable only by the service member's state of domicile; and
  - 2. A service member neither acquires nor loses domicile based on presence in a given state pursuant to military orders.
- C. U.S.C. App. § 574 is constitutionally valid. Dameron v. Broadhead, 345 U.S. 322, 73 S.Ct. 721 97 L.Ed. 1041 (1953).
- D. A service member's nonmilitary income is not protected from double taxation by § 574. Nonmilitary income can be taxed by:
  - 1. The service member's state of domicile, which can tax all income from whatever source derived; and
  - 2. The state in which the income is earned (the legal fiction that a service member's income is earned in the state of domicile applies only to military compensation).

- E. Native American Military Member Exception. *Fatt v. Utah State Tax Com'n*, 884 P.2d 1233 (Utah 1994); *Turner v. Wis. Dep't of Revenue*, 1986 W.L. 2536 (Wis. Tax App. Comm. 1986) (unpub.) (Native American service member's military income is deemed to be earned on his/her federal reservation domicile and thus is not subject to state income taxation).

#### **IV. STATE TAXATION OF SERVICE MEMBER'S SPOUSE'S INCOME.**

- A. Spouses are not protected by 50 U.S.C. App. § 574. Consequently, they may be taxed by:
1. The spouse's state of domicile, which can tax all income from whatever source derived.
    - a) The spouse's current host state if the spouse has become a statutory resident under that state's law, because a state in which one is a statutory resident can tax that individual on all income from whatever source derived. (The legal fiction that income is earned in the state of domicile applies only to a service member's military compensation.)
    - b) The state in which the spouse earned the income, because the state in which nonmilitary income is earned can tax that income.
  2. NOTE: While spouses may be taxed by multiple states, they will likely receive relief in the form of taxation credit.
- B. Trend toward less comprehensive protection of the spouse's income. *United States v. Kansas*, 580 F. Supp. 512 (D. Kan. 1984), aff'd, 810 F.2d 935 (10th Cir. 1987). Kansas, Utah, Missouri, Nebraska, Vermont, and California include nonresident military income in determining tax rate of non-exempt income of either spouse. (AKA "The Kansas Rule").

## V. STATE TAXATION OF REAL AND PERSONAL PROPERTY.

- A. Ad valorem taxation: "A tax imposed on the value of property. The more common ad valorem tax is that imposed... on real estate. Ad valorem taxes can, however, be imposed upon personal property; e.g., a motor vehicle tax may be imposed upon the value of an automobile and is...a tax." Black's Law Dictionary, 48 (5th ed. rev. 1979).
- B. The taxation of real property is not affected by § 574, because real property is taxed where it sits. Real property: "land, and generally whatever is erected or growing upon or affixed to land." Black's Law Dictionary, 1096 (5th ed. rev. 1979). *See also* Charleston County Assessor v. Schmidt, 1998 S.C. Tax LEXIS 56 (S.C. Dep't of Rev. 9 July 1998) (military member on active duty, renting real property, may be taxed at higher rental property tax rate on dwelling, despite SSCRA).
- C. Ad valorem taxation of personal property.
  - 1. Normally, actual physical situs controls.
  - 2. The service member's personal property.
    - a) A service member's solely owned personal property, however, is deemed to be located in the service member's state of domicile, and only the state of domicile can tax it. 50 U.S.C. App. § 574.
      - (1) United States v. Arlington Co., Va., 326 F.2d 929 (4th Cir. 1964) - Naval officer, domiciliary of New Jersey, stationed in Virginia, but on sea duty, who left family and personal property in Virginia could not be taxed by Virginia.
      - (2) Virginia Attorney General Opinion, June 12, 1984 - Although a non-domiciliary service member's personal property may be located in a jurisdiction other than where he/she is stationed, property still exempt from taxation in any jurisdiction of host state. Service member stationed in Arlington cannot be taxed on his auto, though solely driven by wife in another city.

- b) The service member is absolutely immune from taxation of nonbusiness personal property by the host state regardless of whether the service member pays personal property tax on the property to the state of domicile. *But see* Sullivan v. United States, 395 U.S. 169 (1969); 50 U.S.C. App. § 574 prohibits only annually recurring taxes on property; sales, use or excise tax is permissible.
    - (1) Sales Tax. See In re Sales/Use Tax December 1983, No. 85-73, 1985 R.I. Tax LEXIS 72 (R.I. Tax Comm. 1985) (service members must pay local sales tax on purchase of motor vehicle).
    - (2) Use Tax. See Re: Section 58.1-1821 Application Retail Sales and Use Tax, 1994 Va. Tax LEXIS 275 (Va. Tax Comm. 1994) (service member stationed in Virginia purchased furniture in North Carolina but paid no North Carolina sales tax, is subject to Virginia use tax on purchase).
  - c) The § 574 protection for a service member's personal property does not apply to property used by the service member for business or income producing purposes. With respect to such property, situs controls.
- 3. Personal property solely owned by the service member's spouse.
  - a) Generally, the traditional rule of situs controls.
  - b) If, however, the property is located on a military reservation subject to exclusive federal jurisdiction, the property cannot be taxed by the state in which the reservation is located. The property can, however, be taxed by the spouse's state of domicile.
- 4. Personal property which is jointly-owned or is community property may be subject to double taxation:
  - a) By the service member's state of domicile because it is deemed to be located in that state for purposes of personal property taxation.



- b) By the state in which it is physically located because situs governs taxation of the spouse's personal property.
- c) State taxation schemes.
  - (1) Some states tax the property at half value.
  - (2) Some states tax property according to a party's proportionate contribution toward the purchase price.
  - (3) A few states tax the property at full value. See 1976-77 Va. Op. Atty. Gen. 285 (14 Oct. 76) and 1986 Ariz. Op. Atty Gen. 111 (Op. # I86-092) (25 Aug. 86).
  - (4) Some do not try to tax it at all: *See* Mississippi Attorney Gen. Opinion, Feb. 27, 1989 - ad valorem taxes may not be levied on autos owned jointly by military and non-military spouses.

## VI. MOTOR VEHICLES.

- A. The vehicle itself is subject to personal property taxation according to previously stated rules:
  - 1. Vehicles owned solely by a service member are subject to ad valorem personal property taxation only by the service member's state of domicile.
  - 2. Jointly owned and community property state vehicles may be subject to double personal property taxation. (Problem in community property states such as Arizona, California, Louisiana, New Mexico, and Texas.)
- B. Motor vehicle fees - conditional immunity.
  - 1. With respect to vehicles solely owned by the service member, nonresident service persons are immune from "licenses, fees, or excises" imposed by the duty state with respect to motor vehicles, but only if the service member has met the license, fee, and excise requirements of the state of domicile. (§ 574(2)(b)).

2. In determining whether a charge assessed by the duty state is a personal property tax or a license, fee, or excise tax, look behind the label attached to the charge.
  - a) *Sullivan v. United States*, 395 U.S. 169 (1969). § 574 protects from annually recurring property taxes; use or excise tax is permissible.
  - b) *California v. Buzard*, 382 U.S. 386 (1966). State barred from exacting a license fee based on percentage of auto's value. California's 2% tax not essential to registration and licensing vehicle.
  - c) *U.S. v. City of Highwood*, 712 F.Supp. 138 (N.D.Ill. 1989), motion to reconsider denied, 1989 WL 65043 (N.D.Ill. 9 June 1989) - SSCRA exempts nonresident service members from annual revenue raising vehicle fees of host state but not from licensing, fees, or excises essential to functioning and administration of licensing and registration laws.
  - d) *United States v. Wyoming*, 402 F.Supp. 229 (D.Wyo. 1975). Annual registration fee measured by value of vehicle raised revenues and was barred by SSCRA.
3. Pursuant to police powers, states can require compliance with pollution abatement and safety inspection laws even for motor vehicles not subject to state personal property tax and registration requirements.

C. House trailers and mobile homes.

1. Classification as real property v. personal property under federal law will determine taxation status.
  - a) *Snapp v. Neal*, 382 U.S. 397 (1966) (state barred from exacting ad valorem tax on house trailer provided service member complies with laws of home state).
  - b) *United States v. Champaign Co. Ill.*, 525 F.2d 374 (7th Cir. 1975). (SSCRA protection not limited to ad valorem taxes only, but also to annually recurring taxes based on location or situs of property i.e., the mobile home).

- c) United States v. Illinois, 387 F.Supp. 638 (E.D.Ill. 1975)(mobile home privilege tax barred regardless of whether home state taxes the property).
- d) United States v. Chester Co. Bd. of Assess. & Rev. of Taxes, 281 F.Supp. 1001 (E.D.Pa. 1968) (nonresident service members' house trailers not permanently affixed to ground were personal property exempt by SSCRA).
- e) Arizona Attorney General Opinion, Aug. 25, 1986 - Whether mobile home is real or personal property for purposes of SSCRA is question of federal law. It is personal if it retains characteristics of mobility.
- f) Virginia Attorney General Opinion, March 1, 1982 - Nonresident military member exempt from personal property tax on mobile home, though real estate upon which it sits is taxable by host state.
- g) Like a motor vehicle, a mobile home will receive *only conditional immunity* from licensing and fee requirements of the duty state.

## VII. CONCLUSION.

# APPENDIX A

## WHAT IS THE DEFINITION OF “LEGAL RESIDENCE”?

By LTC Michael Brawley, Fort Sheridan Staff Judge Advocate

[Reprinted from the *Fort Sheridan Tower*, 28 February 1988, with permission of the author.]

Soldiers and their family members are often faced during an Army career with the difficult problem of determining where they have established their “legal residence,” also called “domicile.” Your legal residence very often controls where you must pay taxes or vote and where your children are entitled to in-state college tuition rates.

Part of the problem in dealing with “legal residence” and the privileges and obligations flowing therefrom stems from the use of inaccurate, ambiguous, and confusing terminology. The terms “residence,” “legal residence,” “domicile,” “resident,” “home of record,” “home state,” and “home” are often spoken interchangeably and inaccurately by tax bureaucrats, civilians, soldiers, and also used incorrectly in various legal documents that touch each soldier’s personal affairs everyday of his life. I will try to cut through the confusion and provide some clarification on the use of these terms and their legal significance for the soldier or family member.

“Legal residence” means that you are considered a citizen of that particular state. This status is normally acquired by your physical presence within the state, coupled with a desire to be a permanent legal resident, or citizen of that state, as evidenced by the acquisition of those indicators which demonstrate your intent, e.g., registering to vote, buying property, opening bank accounts in local banks, registering your car in the state, acquiring a state driver’s license, and paying state income taxes or personal property taxes.

Once acquired, your legal residence remains the same, even if you are moved to another state on military orders, until such time as you desire to, or circumstances, change it.

Suppose you grew up and always lived in California; that state would be your legal residence. If you move on military orders from your state of legal residence (California) to Illinois, you have the option of keeping California as your legal residence or adopting Illinois.

If you adopt Illinois as your new legal residence, you can enjoy the benefits of citizenship here (e.g., voting, no income tax on military pay), but you must also accept the burdens (e.g., changing your driver’s license and auto tags to Illinois, and losing California in-state tuition rates for your children’s college education).

You normally cannot have your cake and eat it too.

You cannot take the benefits here, and in California, and avoid the burdens in both places. That would be playing “fast and loose” and you could lose the benefits of both places.

One other thing you cannot do is adopt a state as your legal residence without ever being there. For example, if your legal residence was California and you PCS’d to Illinois, you could not adopt Florida as your legal residence just because it has no state income tax, if you never set foot in Florida.

Most state agencies dealing with you on contested tax issues would reject your claim of Florida legal residence, unless you could demonstrate that you lived in Florida at sometime, and then could show that you made efforts to adopt Florida as your legal residence (see indicators above).

“Domicile” for all intents and purposes, means your legal residence. The two terms may be used interchangeably, however I recommend that you use “legal residence” rather than domicile because domicile is less well understood by the general public in common conversation.

“Residence” and “reside” are another pair of words you encounter frequently. Unless elaborated upon, these terms used alone are capable of causing considerable misunderstanding depending upon the perceptions of those who use them, and those who hear them.

In one usage, “residence” is a dwelling unit, such as a house. Someone who is talking about your “legal residence” can however, also use it. When questioned by someone using this term, always ask how the term is being used. The simple question, “Where do you reside?” can mean either “Where do you live right now?” or “Where is your legal residence?” It is essential to seek clarification when “residence” or “reside” are used because the connotations can have significant legal consequences for you. If you intend to refer to your legal residence, always use the modifier “legal” for clarity’s sake.

“Home of Record” (HOR) is a term of some military significance, but not necessarily any legal consequence. HOR is the place from which you were appointed, enlisted or ordered to active duty for military service. It is used by the Army to determine your maximum travel entitlement upon ETS. It could be the same place as your state of legal residence, but it need not be. Suppose you were attending school away from your state of legal residence, and you were commissioned in ROTC and ordered to active duty at that location. Your HOR for purposes of ordering you to active duty could be State College, Pennsylvania, even though you were a legal resident of California and still nurtured a burning desire to return to the Golden State.

As mentioned earlier, Army travel and transportation allowances are based upon HOR when separation from service occurs. Thus, if your HOR is State College, Pennsylvania, and you are going to ETS at Fort Devens, Massachusetts, Uncle Sam will not ship your household goods (HHG) to California for free, or pay your travel for that distance. Your travel allowance limit would be the distance between Fort Devens and State College, Pennsylvania.

Once designated, the HOR is difficult to change for convenience of the soldier, i.e., to pay for transportation of HHG to a point beyond the distance from separation point to HOR is not allowed.

The term HOR is used interchangeably sometimes with "home" or "home state." The term "home" or "home state" depending upon the intent of the speaker, can mean a "house" or "legal residence," or merely the state from which you originally came.

Again, caution should be used when the words "home" or "home state" are being used. "Where is your home?" is a question as innocent or as loaded as the circumstances under which it is being asked may reflect.

The message here should be clear. Always take care when talking about or filling out documents **that refer to "residence", "home state", "resident of", "living at", "home", "domiciliary of", or "legal residence."**

Many times people ask what are the best indicators of legal residence? I think it safe to say that those indicators, which cost you something probably, demonstrate your intent to be a permanent legal resident of a state better than anything else does. For example, filing state tax returns and, when necessary, paying state income taxes, will go a long way in convincing *state* officials that you really do consider state X to be your legal residence. Voting in a particular state over an extended period, or a career, can also be convincing.

Of less consequence would be owning investment property in a state; and still less important would be maintaining bank accounts or CD's in a particular state.

The more indicators of permanent legal residence you established, which are consistent with an intent to return to particular state when you are separated from the military, the easier it will be to convince interested state authorities of the bone fide nature of your claim to citizenship or, as the case may be, to your denial of citizenship in a particular state.

An interesting sidelight is the status of the wife of a soldier. Under common law, and **still** in some states today, a woman's domicile or legal residence is considered to be that of her husband.

The women's liberation movement has made some in-roads into the archaic legal fiction that held that the wife *is* a "chattel" or "property" of the husband, however, the soldier's *wife* should *be* aware that this concept could be an issue for her at sometime *during* the soldier's career.

The spouse of a soldier should be aware that the protections of the Soldier's and Sailor's Civil Relief Act, **do not** shield the family members in all circumstances nearly as well as they do the soldier. For example, while a soldier can retain his home state driver's license *and* *auto* tags while stationed in a duty state, his spouse within a short time after arrival in the state, would normally have to change the tags on her car, *and* her driver's license over to the duty state where the soldier is stationed.

Another question frequently arises, namely that of re-establishing your legal residence in state X after you have changed it to state Y for some reason.

Can you simply retake your old legal residence when it is to your advantage to do so, or must you again have a physical presence within state X before you can again consider it to be your legal residence?

I can give no definite answer here. In most cases, no evidence of your change from State X to Y is likely to exist unless you vote in state Y or voluntarily file legal documents there, such as, tax returns.

If the validity of your change of legal residence is raised by state authorities, you may be required to show that you re-established legal residence via a new presence within State X and that you took actions which would be persuasive indicators of your true intention or re-establishing of citizenship there.

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If the validity of your change in legal residence *is* raised by state authorities, you may be required to show that you re-established legal residence via a new presence within State X and that you took *actions* which would be persuasive indicators of your true intention or re-establishing of citizenship there.

# APPENDIX B

## GUIDELINES FOR MILITARY PERSONNEL -- DRAFT 9-23-91

### State of California Franchise Tax Board

For California income tax purposes the term "resident" is defined as:

- a. Every individual who is in the state for other than a temporary or transitory purpose; and
- b. Every individual domiciled in a state that is outside the state for temporary or transitory purposes.

The theory behind California's definition of resident is that individuals should contribute to the support of the state if they are physically present in California and/or receive substantial benefits and protection from California's laws and government.

#### **What California looks at to determine residency:**

- \* Where the person spends his/her time (in California versus in another state)
- \* Employment (who you work for)
- \* Real property ownership (where you own a home, vacation property or rental property, etc.)
- \* Business interests and investments (location of)
- \* Personal Property (where household goods, cars, boats, etc. are located)
- \* Spouse/family (where they live)
- \* Social and religious connections (do you belong to clubs or a church, if so, where are they located)
- \* Services of professionals (where your doctor, lawyer, dentist, etc. are located)
- \* Voting registration (not registered or not voting in state declared as legal residence)
- \* Vehicle registration (where vehicles are registered)
- \* State Income Tax (not paying in state declared as residence, when that state has a tax)

The question is, where do you really live? The key is what ties you have in California versus what ties you have in another state

#### **Maintaining Nonresident status:**

As military personnel, there are specific things California considers when making the determination as to whether you are a California resident. If you have done or are doing these things you probably are not a California resident.

On the other hand, not doing them does not automatically make you a California resident. Like nonmilitary individuals, you have to consider all of your ties to California versus your ties to another state.



## **We will generally consider you to be a nonresident if you:**

\* **Maintain ties to another state.** If you are declaring that you changed your residence after entering the military, we will look at the reason for the change to determine how much weight to give this factor. Declaring a state to be your residence to avoid state taxes does not, by itself, indicate you are a resident of that state.

### **AND**

\* **Live in government quarters while in California.** If you do not live in government quarters, the reason for not doing so will be considered. For instance, if you are living in private housing while waiting for government quarters, or because government quarters are not available, this would be an indication of nonresidence.

\* **Have any vehicle you own registered in the state you claim as your residence.**

\* **Have a child attending college in the state you claim as your residence and he or she is paying resident tuition.** If you have a child attending community college or four-year college or university in California and claiming to be a resident of California, we would consider that a strong indication that you are also a California resident.

Again the question is, to which state do you have the strongest ties? Doing just one of these things may not make you a nonresident. And not doing one or several of them would not necessarily make you a resident.

## **Specific Actions Which Make You a California Resident:**

**When you declare you are a California resident for some purpose, such as one of those listed below, you also become a California resident for personal income tax purposes, regardless of what other ties you may maintain with another state.**

- \* Registering to vote in California
- \* Filing for a homeowner's exemption in California
- \* Claiming to be a resident for purposes of attending a community college, a four-year college or a university in California
- \* Getting a divorce through the California courts as a California resident
- \* Filing California income tax returns and/or changing your tax home to California for purposes of withholding

### **THINGS THAT HAVE CHANGED IN THE MILITARY:**

- \* **No longer a draft.** Individuals choose the military as a career same as they would choose to work for the IRS or IBM, both of which have mandatory transfer policies.
- \* **Average age for “enlisted” personnel is no longer 19.** It is now 26 for enlisted and older for officers.
- \* **The average length of duty tour is now three years instead of two.**
- \* **Military personnel now have some choice as to where they are stationed.** and the military now takes family into consideration (for instance if both are military, the services will try to station together).
- \* **The pay for military personnel is now much more in line with similar jobs outside of the service.**
- \* **Military personnel are no longer young men who left home unwillingly and who intend to go “home” as soon as their two years are up. Instead the military is made up of individuals who make their home wherever they are assigned. Wherever they are stationed they bring their family, establishing social ties, sending their children to public schools, etc.**

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## APPENDIX C

STATE OF LEGAL RESIDENCE CERTIFICATE		
<b>DATA REQUIRED BY THE PRIVACY ACT OF 1974</b>		
<b>AUTHORITY:</b>	Tax Reform Act of 1976, Public Law 94-455.	
<b>PURPOSE:</b>	Information is required for determining the correct State of legal residence for purposes of withholding State income taxes from military pay.	
<b>ROUTINE USES:</b>	Information herein will be furnished State authorities and to Members of Congress.	
<b>MANDATORY OR VOLUNTARY DISCLOSURE:</b>	Disclosure is voluntary. If not provided, State income taxes will be withheld based on the tax laws of the State previously certified as your legal residence, or in the absence of a prior certification, the tax laws of the applicable State based on your home of record.	
NAME <i>(Last, first, middle initial)</i>	SOCIAL SECURITY NUMBER (SSN)	
LEGAL RESIDENCE/DOMICILE <i>(City or county and State)</i>		
<p style="text-align: center;"><b>INSTRUCTIONS FOR CERTIFICATION OF STATE OF LEGAL RESIDENCE</b></p> <p>The purpose of this certificate is to obtain information with respect to your legal residence/domicile for the purpose of determining the State for which income taxes are to be withheld from your "wages" as defined by Section 3401(a) of the Internal Revenue Code of 1954. PLEASE READ INSTRUCTIONS CAREFULLY BEFORE SIGNING.</p> <p>The terms "legal residence" and "domicile" are essentially interchangeable. In brief, they are used to denote that place where you have your permanent home and to which, whenever you are absent, you have the intention of returning. The Soldiers' and Sailors' Civil Relief Act protects your military pay from the income taxes of the State in which you reside by reason of military orders unless that is also your legal residence/domicile. The Act further provides that no change in your State of legal residence/domicile will occur solely as a result of your being ordered to a new duty station.</p> <p>You should not confuse the State which is your "home of record" with your State of legal residence/domicile. Your "home of record" is used for fixing travel and transportation allowances. A "home of record" must be changed if it was erroneously or fraudulently recorded initially.</p> <p>Enlisted members may change their "home of record" at the time they sign a new enlistment contract. Officers may not change their "home of record" except to correct an error, or after a break in service. The State which is your "home of record" may be your State of legal residence/domicile only if it meets certain criteria.</p> <p>The formula for changing your State of legal residence/domicile is simply stated as follows: <u>physical presence in the new State with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile.</u> In most cases, you must actually reside in the new State at the time you form the intent to make it your permanent home. Such intent must be clearly indicated. Your intent to make the new State your permanent home may be indicated by certain actions such as: (1) registering to vote; (2) purchasing residential property or an unimproved residential lot; (3) titling and registering your automobile(s); (4) notifying the State of your previous legal residence/domicile of the change in your State of legal residence/domicile; and (5) preparing a new last will and testament which indicates your new State of legal residence/domicile. <u>Finally</u>, you must comply with the applicable tax laws of the State which is your new legal residence/domicile.</p> <p>Generally, unless these steps have been taken, it is doubtful that your State of legal residence/domicile has changed. Failure to resolve any doubts as to your State of legal residence/domicile may adversely impact on certain legal privileges which depend upon legal residence/domicile including among others, eligibility for resident tuition rates at State universities, eligibility to vote or be a candidate for public office, and eligibility for various welfare benefits. If you have any doubt with regard to your State of legal residence/domicile, you are advised to see your Legal Assistance Officer (JAG Representative) for advice prior to completing this form.</p>		
<p>I certify that, to the best of my knowledge and belief, I have met all the requirements for legal residence/domicile in the State claimed above and that the information provided is correct.</p> <p>I understand that the tax authorities of my former State of legal residence/domicile will be notified of this certificate.</p>		
SIGNATURE	CURRENT MAILING ADDRESS <i>(Include ZIP Code)</i>	DATE

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USAPPC V1.00



## APPENDIX D

1997-AUG ARMLAW 24  
(Cite as: 1997-AUG Army Law. 24)

Army Lawyer  
August, 1997

Department of the Army Pamphlet 27-50-297  
TJAGSA Practice Note: Legal Assistance Item  
Tax Law Note

### **NONMILITARY SPOUSE'S JOINT OWNERSHIP OF PERSONAL PROPERTY VOIDS SOLDIERS' AND SAILORS' CIVIL RELIEF ACT PERSONAL PROPERTY TAX PROTECTION**

Lieutenant Colonel Conrad

*Opinions and conclusions in articles published in the Army Lawyer are solely those of the authors. They do not necessarily reflect the views of the Judge Advocate General, the Department of the Army, or any other government agency.*

Legal assistance attorneys should advise their clients that the Soldiers' and Sailors' Civil Relief Act (SSCRA) only protects service members from multiple state personal property or ad valorem taxation. [FN57] Normally, individual personal property is taxed where it sits (situs). [FN58] The SSCRA provides the legal fiction that a military member's personal property which is titled solely in the name of the service member is sited in the state of domicile and can only be taxed by that state. [FN59] Further, the host state, where the service member is stationed on military orders, may not tax a military member's personal property just because the domiciliary state did not tax the personal property. [FN60]

In contrast to military members, a nonmilitary spouse receives no SSCRA protection from multiple state personal property taxation for property titled solely in the nonmilitary spouse's name or any property titled jointly in the names of the service member and the nonmilitary spouse. [FN61] No reported appellate case has considered the issue of whether the SSCRA tax protections apply to nonmilitary spouses. Nonmilitary spouses can be taxed on their solely owned or jointly held personal property in the state where the property is physically located as well as in the state where the nonmilitary spouse is domiciled. [FN62] Community property states, such as California, do not fit neatly into the traditional common law concepts of joint tenancy or tenancy in common ownership. The rights of husband and wife regarding title to personal property vary from \*25 state to state depending on how each state interprets its statutory community property system. [FN63]

The most common problem area regarding personal property is whether a host state may tax

motor vehicles titled jointly in the names of a military member and a nonmilitary spouse. The majority of states that utilize a personal property tax follow a policy of taxing jointly titled motor vehicles where one of the title holders is a military member. [FN64] The taxation formulas vary from state to state, ranging from half value to full value. [FN65] Only a few states do not attempt to tax jointly-held motor vehicles or other personal property owned in part by a military member and a nonmilitary spouse. [FN66]

What does this mean for legal assistance clients? Attorneys should advise their clients to title their motor vehicles, camping trailers, and boats solely in the military member's name. The SSCRA tax protection statute (Section 514) was enacted in the 1940s, when women did not have equal property rights to men and most military spouses did not work outside the home. Today, it is not uncommon for a nonmilitary spouse to work outside the home, and two income military families are the norm. Congress has not extended the SSCRA tax protections to nonmilitary spouses. Until Congress acts, military families should keep their taxable personal property titled solely in the military member's name, if they wish to avoid host state taxation. Lieutenant Colonel Conrad.

FN57. Soldiers' and Sailors' Civil Relief Act (SSCRA), ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 U.S.C. App. §§ 501-593 (1996)). Section 514 of the SSCRA, dealing with multiple state income and personal property taxation of service members, was added by the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, ch. 581, § 17, 56 Stat. 777; and was subsequently amended further by ch. 397, § 1, 58 Stat. 722 (1994); Pub. L. No. 87-771, 76 Stat. 768 (1962); and Pub. L. No. 102-12, § 9(24), 105 Stat. 41 (1991) (codified at 50 U.S.C. App. § 574). As to personal property taxes, SSCRA § 514, states:

(1) For the purposes of taxation in respect of any person, or of his personal property ... by any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become a resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property ... of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled ... personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: provided, that nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction.

(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles).

FN58. SSCRA § 514.

FN59. Id.

FN60. *Dameron v. Brodhead*, 345 U.S. 322 (1953).

FN61. SSCRA § 514. This section provides no statutory protection against multiple state taxation of the

income and personal property of nonmilitary spouses. But cf. SSCRA § 536 (explicitly setting forth SSCRA protections that apply to nonresident military spouses as to leases, mortgages, and contracts); *Brunson v. Chamberlina*, 53 N.Y.S.2d 172 (N.Y. Mun. Ct. 1945); *Wanner v. Glen Ellen Corporation*, 373 F. Supp. 983 (D. Vt. 1974). See also 1986 Op. Ariz. Att'y Gen. 111 (1986); Op. S.C. Att'y Gen. 3000 (1970); 1984-85 Op. Va. Att'y Gen. 363 (1984); 1976-77 Op. Va. Att'y Gen. 285 (1976).

FN62. 1983-84 Op. Va. Att'y Gen. 393 (1984).

FN63. 1976-77 Op. Va. Att'y Gen. (1976). 15 AM. JUR. 2D Community Property § 1 (1964). The following states have adopted some sort of community property system: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

FN64. See 1986 Op. Ariz. Att'y Gen. 111 (1986); Op. S.C. Att'y Gen. 3000 (1970); 1984-85 Op. Va. Att'y Gen. (1984); and 1976-77 Op. Va. Att'y Gen. 285 (1976).

FN65. See Comment, State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act, 36 MIL. L. REV. 123 (1967). The State of Virginia taxes the full value of personal property held in the joint names of a military member and the nonmilitary spouse. See 1976-77 Op. Va. Att'y Gen. 285 (1976).

FN66. 1989 Op. Miss. Att'y Gen (1989).





# **Chapter 10**

## **INFORMATION PAPERS AND BRIEFING NOTES**



## The Soldiers' and Sailors' Civil Relief Act

1. The Soldiers' and Sailors' Civil Relief Act (SSCRA) is a federal law that gives all service persons some important rights as they enter active duty. This information paper outlines some of those rights and benefits. The information in this paper is for personnel in the Reserve Components who are activated to serve on active duty [and Active Component personnel deployed away from home station].
2. When does the SSCRA protect me?  
  
?? Most SSCRA protection commences on the day you receive your orders to active duty. As a practical matter, you should be ready, and expect to present a copy of those orders to whomever you ask for some right or benefit under the Act.
3. I have heard about 6% loans. How do I get them?  
  
?? You may be entitled to have the interest rate on some of your loans reduced to 6% for the time you are on active duty. There are a number of special requirements. You need to talk to a Legal Assistance Attorney to ensure you are eligible. You may be eligible if you and your loan meet the following conditions:
  - a) You took out the loan during a time when you were not on any form of **active duty** in any branch of the military.
  - b) The interest rate is currently above 6% per year.
  - c) Your military service affects your ability to pay the loan at the regular (pre-service) interest rate. Generally this requirement means that you make less money in the military than you made as a civilian. There are some special legal issues here - you should be ready to talk to your Legal Assistance Attorney about your entire financial situation.
  - d) You notified the lender.
4. What about the lease on my apartment? I live alone and I will not be there. I want to let my apartment go and put my furniture in storage. Can I get out of my lease?  
  
?? Generally - **yes**. If you have a lease for a house, apartment, or even a business location, you may be able to get out of the lease when you come on active duty. Here are the requirements:

- a) You originally signed your lease when you were not on any form of active duty.
  - b) You have received your orders to active duty.
  - c) You gave written notice to your landlord that you want to terminate your lease. You will still have to pay rent for a short while. Your landlord can charge you rent for 30 days after the date your next rent is due, after the date you give your written notice. Example: You give notice on 15 December. Your next rent is normally due 1 January. The landlord can make you pay rent until 31 January. The key is to get the written notice in the landlord's hands just as soon as possible.
5. I have to go to court on a lawsuit that came up over an auto accident last year. How can I get the lawsuit delayed?
- ?? If you are a party (one of the people suing or being sued) in a civil case (not a criminal case), your commander can ask the judge to stay or temporarily delay the proceedings until you can appear. Generally, your commander will have to show that military duty is keeping you from going to court. This is a tricky legal area - I recommend you have your civilian lawyer contact a Military Legal Assistance Attorney to discuss the best way to proceed in your case.
6. I am self-employed and I have health coverage that is pretty expensive. Can I stop my health coverage? What will happen when I get off of active duty and I try to start it again - will I still be covered?
- ?? As long as you are on active duty, your health care needs are covered by the Military's medical facilities. In addition, your family members will become eligible for coverage. You may want to suspend your civilian coverage. If you do this, the SSCRA will require your civilian insurance company to reinstate your coverage when you get off of active duty. They have to write you a policy. They cannot refuse to cover most "pre-existing conditions."
7. Will I have to pay state income taxes on my pay while I am on active duty?
- ?? If your home state taxes military pay, you will have to pay those taxes. If you get assigned to another state, you will still legally be a "domiciliary" of your home state. The state to which the military assigns you cannot tax your military pay. If you moonlight, they can tax that pay - just your military pay is exempt.

# APPENDICES



# Appendix A - DOJ SSCRA Enforcement



Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 12, 1991

Honorable Terrance O'Donnell  
General Counsel  
Department of Defense  
The Pentagon  
Room 3E 880  
Washington, D.C. 20301

Dear Terry:

The Soldiers' and Sailors' Civil Relief Act provides several important protections for our active and reserve service members defending the nation's interests. One of these protections is a maximum interest cap on the financial obligations of individuals who were subject to an obligation prior to entering on active duty and whose active duty materially affects their ability to pay on the obligation. Persons meeting these requirements are entitled to a 6 per centum cap on the obligation during the period of active duty.

Most reputable financial institutions are aware of this provision and promptly give effect to its protections upon application by the service member. There have, however, been reports that some institutions are not so cooperative. In the event an individual service member is denied this protection it is reasonable to expect that requests may be made for representation of the interests of these individuals by the United States. Although the Act does not provide for such representation, 28 U.S.C. § 517 authorizes the Department to represent individuals when such representation is in the interests of the United States. In appropriate circumstances, a denial of Soldiers' and Sailors' Civil Relief Act benefits would warrant such representation. By the attached memorandum I have informed all United States attorneys of the procedures which should be used to request representation.

Obviously the Department of Defense shares our commitment to protect all benefits which Congress has provided for our service members. In that spirit, I would appreciate your assistance in disseminating the information and procedures contained in the



- 2 -

enclosed memorandum to appropriate offices within the Department of Defense and its military components.

Sincerely,

*Stuart*  
Stuart M. Carson  
Assistant Attorney General  
Civil Division

# Appendix A - DOJ SSCRA Enforcement



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 11, 1991

## MEMORANDUM

TO: All United States Attorneys

FROM: Stuart M. Carson, *SMC*  
Assistant Attorney General  
Civil Division

SUBJECT: Requests for Representation Concerning the Soldiers' and Sailors' Civil Relief Act

The deployment of our armed forces to the Arabian Gulf and the extensive reliance upon reservists to meet deployment needs may result in reservists invoking the protections of the Soldiers' and Sailors' Civil Relief Act limiting the rate of interest which they may be charged in certain circumstances. Efforts to realize the benefits of that Act may generate inquiries to your offices concerning the potential availability of representation by the United States in actions to enforce the provisions of the Act and appropriate procedures for processing requests.

The maximum rate of interest provision of 38 USC App. § 526 states:

No obligation or liability bearing interest at a rate in excess of 6 per centum per annum incurred by a person in military service prior to his entry into such service shall, during any part of the period of military service which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (October 6, 1942), bear interest at a rate in excess of 6 per centum per annum unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 per centum per annum is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability.

Accordingly, an individual who was subject to an obligation prior to entering on active duty and whose active duty materially affects his or her ability to pay on the obligation, is entitled to a 5 per centum cap on the obligation during the period of active duty.

Most reputable financial institutions are aware of this provision and promptly give effect to its protections upon application by the servicemember. There have, however, been reports that some institutions are not so cooperative. In the event an individual servicemember is denied this protection it is reasonable to expect that either the Civil Division or United States Attorneys will receive inquiries asking whether the United States may represent the individual. The Act does not provide for such representation. Nevertheless, Title 28 U.S.C. § 517 authorizes the Department to represent individuals when such representation is in the interests of the United States. In appropriate circumstances, a denial of Soldiers' and Sailors' Relief Act benefits would warrant such representation. An individual wishing to request Department of Justice representation concerning this provision needs to submit a signed request through the military department with which the individual served to this office for consideration by the representation committee. The request should include information sufficient to determine the precise nature of the underlying obligation, and how military service has materially affected the individual's ability to meet the obligation. The military department concerned should include its recommendation in a forwarding endorsement.

The Department of Justice views the protection of the benefits of the Act as a very serious matter particularly in this time of reliance on our reserve forces.

# Appendix B - Model U.S. Attorney SSCRA Settlement Agreement

**\*\*\*WARNING:** *Legal Assistance Attorneys should not contact U.S. Attorney Offices or the Department of Justice on SSCRA enforcement matters, before coordinating such action with the Legal Assistance Policy and Litigation Divisions, OTJAG.*

**U.S. Department of Justice**

**United States Attorney**

*District of New Jersey*

---

**Via Telefax**

**(201) 621-2945**

**(Recipient's Address)**

**Re: United States of America ex rel.** \_\_\_\_\_

---

Dear Mr. \_\_\_\_\_:

As I related in our telephone conversation, this office represents the United States in the captioned matter referred to us by the Adjutant General of the New Jersey National Guard.

Sergeant \_\_\_\_\_ is attached to the 253rd Transportation Company of the New Jersey National Guard. He and his company were ordered to active duty as part of Operation Desert Shield. Sergeant \_\_\_\_\_ and his company are currently deployed in Saudi Arabia.

Pursuant to 50 U.S.C. App. § 526, Sergeant \_\_\_\_\_ has requested a reduction in the payments due on the loan held by your client. The statute provides for a maximum of six per cent interest on an obligation incurred by a serviceman prior to his entry upon active duty for any period of active duty. By its very terms, the statute does not require a congressional declaration of war to be effective. Moreover, the fact that Sergeant \_\_\_\_\_ was in the National Guard when the obligation was incurred is irrelevant. 50 U.S.C. App. § 511(1) defines "military service" as "Federal service on active duty". . . Thus, the obligation was incurred before Sergeant \_\_\_\_\_ was in "military service" within the meaning of the statute. See also, House Report No. 2198 77th Congress, p.1.

Excess interest is not accumulated or added to principal; it is forgiven, not deferred. This again, is plain from a reading of the statute; however, the legislative history of the act makes it clear that this was the intent. House Report No. 2198, 77th Congress, supra, p.4.; 88th Cong. Record 5366, remarks of Representative Kilday.

I understand that servicing agent's offer was to reduce the interest rate but to retain the same payment amount.

A reduction in the interest rate to six percent but retaining the original monthly payment amount would have a peculiar affect not in keeping with congressional intent. The effect would be a prepayment of principal and a reduction in the principal balance due. This would not help with a "cash flow" problem that the act was directed toward.

On September 12, 1990 the House and Senate Veterans' Affairs Committee held a joint hearing on the Act.<sup>1</sup> Representatives of the Mortgage Banking Industry acknowledged that lenders should forgive interest above six per cent if a service member otherwise qualifies for protection. In agreement were representatives of the Mortgage Bankers Association of America, the Federal National Mortgage Association (Fannie Mae) and the Government National Mortgage Association (Ginnie Mae).

The proposed settlement of this matter, that you and I have discussed, is as follows:

1. The obligation of \_\_\_\_\_ and \_\_\_\_\_ shall bear interest at the rate of 6% per annum from September \_\_\_\_, \_\_\_\_\_ until Sergeant \_\_\_\_\_ discharge from active duty, when it will return to the contract rate.
2. Sergeant \_\_\_\_\_ will advise your client when he is released form active duty.
3. Credit shall be given for any payment made on account of interest accrued since September \_\_\_\_, \_\_\_\_\_ at a rate exceeding 6 percent; said credit to be applied to the next due installment(s).
4. \_\_\_\_\_ Mortgage will abide by terms of the act. \_\_\_\_\_ Mortgage will advise this office by letter if there have been any additional requests made for protection under the Act. \_\_\_\_\_ Mortgage further agrees that applications for interest rate reductions made by eligible servicemen will be granted.

---

<sup>1</sup> The Soldiers' and Sailors' Civil Relief Act: Joint Hearing before the House and Senate Veterans Affairs Committees, 101st Congress., 2d Sess. (1990) reported in The Army Lawyer, Nov. 1990, p. 50.

As for implementation of a rate reduction I believe that this could be easily done. The simplest method would be to take the original loan term (here 15 years) and the original principal balance<sup>2</sup> (here \$\_\_\_\_\_) and apply a 6% interest rate. The monthly payment due is then \$\_\_\_\_\_. Upon discharge from active military service, the rate would return to \_\_%. Upon completion of the remaining payments at the contract rate, the loan would be paid in full.

Copies of the cited Senate reports and congressional record are enclosed.

Please advise at your earliest convenience if this is acceptable to your client.

Very truly yours,

\_\_\_\_\_  
United States Attorney

By: \_\_\_\_\_  
Assistant U.S. Attorney

Enclosures

cc: \_\_\_\_\_  
U.S. Army Litigation Division  
\_\_\_\_\_  
Legal Advisor to the Adjutant General  
\_\_\_\_\_  
Military Member

<sup>2</sup> Strictly speaking, it would seem that the act would require use of the current principal balance here; the current principal balance is, by your information, \$\_\_\_\_\_.00. In the interest of simplicity, the original balance is close enough.

